

***United States Court of Appeals
for the Second Circuit***



APPENDIX

ORIGINAL

75-7387

United States Court of Appeals

For the Second Circuit.

Superintendent of Insurance of the State of New York, as
Liquidator of Manhattan Casualty Company,
Plaintiff-Appellee,

v.

Bankers Life and Casualty Company, Irving Trust Co., Belgian
American Banking Corporation, Belgian American Bank & Trust
Company, Carvin Bantel & Company, New England Note
Corporation, The Estate of George K. Garvin by Ruth N.
Carvin, The Estate of James P. Begole, by Patricia C.R. Begole,
as Executrix, John F. Sweeney, The Estate of Standish T.
Bourne, by Standish T. Bourne, Jr.,

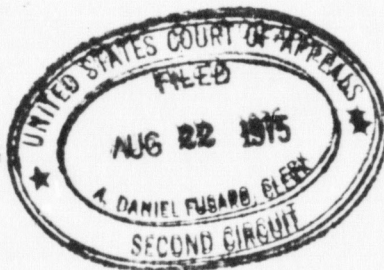
Defendants-Appellees.

and

Harry Berg and Florence H. Brandenburg, Executrix,
Intervenors-Objectors-Appellants.

Appendix

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

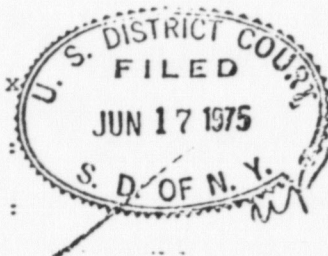
SUPERINTENDENT OF INSURANCE OF THE
STATE OF NEW YORK, AS LIQUIDATOR OF
MANHATTAN CASUALTY COMPANY,

Plaintiff,

-against-

BANKERS LIFE AND CASUALTY COMPANY,
IRVING TRUST COMPANY, BELGIAN
AMERICAN BANKING CORPORATION, BELGIAN
AMERICAN BANK & TRUST COMPANY, GARVIN
BANTEL & COMPANY, NEW ENGLAND NOTE
CORPORATION, THE ESTATE OF GEORGE K.
GARVIN by RUTH M. GARVIN, THE ESTATE
OF JAMES F. BEGOLE by PATRICIA C. R.
BEGOLE, as Executrix, JOHN F. SWEENEY,
THE ESTATE OF STANDISH T. BOURNE, by
STANDISH T. BOURNE, JR.,

Defendants.



: 63 Civ. 2490 (CLB)

: ORDER

Motions having been made by Notice of Motion and
supporting affidavit dated February 6, 1975 by Harry Berg,
Florence H. Brandenburg and Harry Berg and Florence H. Brandenburg
on behalf of themselves and others as taxpayers of the State of
New York (hereinafter collectively referred to as intervenors-
objectors) for orders:

(a) Granting leave to intervene in this action;

(b) Enjoining the parties to this action from
interposing any defense based upon any judgment entered
in the state court of this State approving a settlement
of this action;

(c) Enjoining the parties from releasing the defendants on behalf of Manhattan Casualty Company of the claims asserted in this action;

(d) Granting the right to amend the complaint

(e) Determining that the Supreme Court of the State of New York had no jurisdiction to pass upon the fairness or reasonableness of the settlement of this action;

(f) Determining that Manhattan Casualty, its creditors and shareholder and taxpayers were deprived of due process in the state court; and

(g) Disapproving the settlement agreement of June 8, 1972.

After reading the supporting affidavit, the memorandum of intervenors-objectors in support of the motion and the exhibits submitted therewith, and the reply memorandum of intervenors-objectors in support of said motions, and the affidavit of Morton J. Schlossberg sworn to February 18, 1975, the memorandum of law in opposition to the motion submitted on behalf of the plaintiff, the affidavit of Michael M. Maney sworn to February 20, 1975 and the exhibits attached thereto, the memorandum of defendants Bankers Life, Irving Trust Company, Belgian American, Garvin Bantel & Company and the Estate of George K. Garvin, all submitted in opposition to the motions, and after hearing argument of counsel on February 25, 1975, and due deliberation having been had thereon, and upon the memorandum decision of the Court dated June 3, 1975, it is

ORDERED, that the motions of the intervenors-objectors be and the same are hereby denied, and it is further

ORDERED, that consummation of the settlement, delivery of the releases and the filing of the stipulation of discontinuance shall be stayed for a period of 15 days from the date of the entry of this order.

Dated: New York, New York
June 11, 1975

Charles L. Bryant IV

U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FILED
DISTRICT COURT
3 5 01 AM '75
S.D. OF N.Y.

-----X
SUPERINTENDENT OF INSURANCE OF THE :
STATE OF NEW YORK, AS LIQUIDATOR OF :
MANHATTAN CASUALTY COMPANY, :

Plaintiff, :

-against- :

BANKERS LIFE AND CASUALTY COMPANY, :
IRVING TRUST COMPANY, BELGIAN :
AMERICAN BANKING CORPORATION, BELGIAN: :
AMERICAN BANK & TRUST COMPANY, GARVIN, :
BANTEL & COMPANY, NEW ENGLAND NOTE :
CORPORATION, THE ESTATE OF GEORGE K. :
GARVIN by RUTH M. GARVIN, THE ESTATE :
OF JAMES F. BEGOLE by PATRICIA C. R. :
BEGOLE, as Executrix. JOHN F. SWEENEY, :
THE ESTATE OF STANDISH T. BOURNE, by :
STANDISH T. BOURNE, JR., :

Defendants.:
-----X

63 Civ. 2490-CLB *ut*

#42528

MEMORANDUM DECISION

• Brieant, J.

Counsel representing (1) Harry Berg, a claimed creditor of Manhattan Casualty Company (hereinafter "Manhattan"), (2) Florence H. Brandenburg, Executrix of the Estate of Matthew H. Brandenburg, deceased, in her capacity as sole shareholder of Manhattan, and (3) Harry Berg and Florence H. Brandenburg on behalf of themselves and others as taxpayers of the State of New York, moves for an order

MICROFILM

JUN 04 1975

(a) granting Berg, on behalf of himself and all creditors of Manhattan; Mrs. Brandenburg, as Executrix, as sole shareholder of Manhattan; and Berg and Mrs. Brandenburg as taxpayers; and on behalf of the other New York taxpayers, leave to intervene in this action for the purpose of protecting the rights of Manhattan, its creditors, shareholder and the taxpayers, (b) "enjoining the parties to this action from interposing ... any defense based upon any judgment entered in the state court of this State, which approves a settlement agreement [to dispose of this and a related state court action] made as of June 8, 1972, and from using same to seek a dismissal of this case," (c) enjoining the parties from releasing the defendants on behalf of Manhattan of the claims asserted in this action, (d) granting the intervenors the right to amend the complaint to assert as a pendent claim the claim asserted in Supreme Court of the State of New York, County of New York, Index No. 11358/65, (e) determining that the Supreme Court of the State of New York had no jurisdiction to pass upon the fairness and reasonableness of the June 8, 1972 settlement agreement, and that any order or judgment of the courts of the State of New York is a nullity insofar as this action in this Court is concerned, (f) determining that in the state court Manhattan, its

creditors and shareholder, and the taxpayers were "deprived of procedural and substantive due process", (g) disapproving the settlement agreement made as of June 8, 1972.

This litigation was initiated in this Court on August 19, 1963 by the then incumbent Superintendent of Insurance of New York (hereinafter "Superintendent"), a state official, acting pursuant to §510, et seq. of the New York Insurance Law, and also an order of the Supreme Court of New York County dated May 24, 1963, which adjudged Manhattan insolvent pursuant to Article XIV of that statute and appointed the Superintendent as its Liquidator. The liquidation proceedings have continued, under the supervision of that Court, by the original plaintiff, and his successors in office since that date.

Manhattan's insolvency occurred as a result of a swindle perpetrated by one James F. Begole, acting in concert with some others, sued here, and facilitated, intentionally, innocently or negligently by the remaining defendants not actually participating in his scheme. The reader's familiarity with the unanimous opinion of the Supreme Court by Mr. Justice Douglas, delivered in this action November 8, 1971 is assumed. Supt. of Insurance of New York

v. Bankers Life & Casualty Co., et al., 404 U.S. 6. There, the Court unanimously upheld the complaint in this action, which had been dismissed on June 3, 1969 by Judge Herlands of this Court (300 F.Supp. 1083, aff'd. 430 F.2d 355).

We cannot improve upon the elucidation of the facts pleaded as set forth by Mr. Justice Douglas, 404 U.S. 6, 7, et seq.

"It seems that Bankers Life & Casualty Co., one of the respondents, agreed to sell all of Manhattan's stock to one Begole for \$5,000,000. It is alleged that Begole conspired with one Bourne and others to pay for this stock, not out of their own funds, but with Manhattan's assets. They were alleged to have arranged, through Garvin, Bantel & Co.--a note brokerage firm--to obtain a \$5,000,000 check from respondent Irving Trust Co., although they had no funds on deposit there at the time. On the same day they purchased all the stock of Manhattan from Bankers Life for \$5,000,000 and as stockholders and directors, installed one Sweeny as president of Manhattan.

Manhattan then sold its United States Treasury bonds for \$4,854,552.67. [footnote omitted] That amount, plus enough cash to bring the total to \$5,000,000, was credited to an account of Manhattan at Irving Trust and the \$5,000,000 Irving Trust check was charged against it. As a result, Begole owned all the stock of Manhattan, having used \$5,000,000 of Manhattan's assets to purchase it.

To complete the fraudulent scheme, Irving Trust issued a second \$5,000,000 check to Manhattan which Sweeny, Manhattan's new president, tendered to Belgian-American Bank & Trust Co. which issued a \$5,000,000 certificate of deposit in the name of Manhattan. Sweeny endorsed the certificate of deposit over to New England Note Corp., a company alleged to be controlled by Bourne. Bourne endorsed the certificate

over to Belgian-American Banking Corp. [footnote omitted] as collateral for a \$5,000,000 loan from Belgian-American Banking to New England. Its proceeds were paid to Irving Trust to cover the latter's second \$5,000,000 check.

Though Manhattan's assets had been depleted, its books reflected only the sale of its Governments bonds, and the purchase of the certificate of deposit and did not show that its assets had been used by Begole to pay for his purchase of Manhattan's shares or that the certificate of deposit had been assigned to New England and then pledged to Belgian-American Banking."

The complaint here charged a violation of §17a of the Securities Act of 1933 [15 U.S.C. §77q(a)] and of §10(b) of the Securities Exchange Act of 1934 [15 U.S.C. §78j(b)].

Judge Herlands, in dismissing the complaint, described the activities charged against Begole and his confederates (p.1102 of 300 F.Supp.):

"The complaint, taken as a whole, alleges no more than a common law action for misappropriation of corporate funds by a fiduciary, embezzlement or fraudulent conveyance perhaps, or the distribution of an illegal dividend. None of these actions, in the absence of diversity of citizenship, can be maintained in a federal court."

Until November 8, 1971, when the Supreme Court rendered its unanimous opinion, the views of the late Judge Herlands were widely held, and represented prevailing opinion.^{1/} Recognizing

the likelihood that the fraud practiced upon Manhattan might not be actionable in this Court, this plaintiff had initiated companion litigation in the Supreme Court of the State of New York, New York County, under Index No. 11358/65. That Court had general subject matter jurisdiction of the state or common law claims asserted. No proceedings were held in the state action until after the June 8, 1972 settlement agreement was executed.

While the opinion of the Supreme Court declares broad doctrine in the construction of the federal securities laws, it has an extremely narrow application to this particular litigation. The Court's opinion continues (pp. 13, 14 of 404 U.S.):

"The case was before the lower courts on a motion to dismiss.

Bankers Life urges that the complaint did not allege, and discovery failed to disclose, any connection between it and the fraud and that, therefore, the dismissal of the complaint as to it was correct and should be affirmed. We make no ruling on this point.

The case must be remanded for trial. We intimate no opinion on the merits, as we have dealt only with allegations and with the question of law whether a cause of action as respects the sale by Manhattan of its Treasury bonds has been charged under §10(b).¹⁰ [(Footnote 10) Petitioner's complaint bases his single claim for recovery alternatively on three different transactions alleged to confer jurisdiction under § 10(b): Manhattan's sale of the Treasury bonds; the sale of Manhattan stock by Bankers Life to Bourne and Begole; and the transactions involving

the certificates of deposit. We only hold that the alleged fraud is cognizable under §10(b) and Rule 10b-5 in the bond sale and we express no opinion as to Manhattan's standing under §10(b) and Rule 10b-5 on other phases of the complaint. (citations omitted)] We think it has been so charged and accordingly we reverse and remand for proceedings consistent with this opinion.

All defenses except our ruling on § 10(b) will be open on remand."

As previously noted, the effect of the fraud was to decrease Manhattan's working capital by \$5,000,000.00, which rendered it insolvent, and incapable of performing its executory obligations to its policyholders, protecting them against casualty losses under existing insurance policies.

Insolvency of a casualty insurer places particular burdens on the insured, claimants against them and the public generally, far greater than that in the case of insolvency of an ordinary business. Recognizing the severe disruption caused by insurance company failures, New York, by a comprehensive statutory scheme, Insurance Law §§1-677, has provided for strict regulation of the manner in which the affairs of an insurance company may be conducted, has limited the writing of casualty insurance to licensed insurers, and has provided the aforementioned statutory method by which a state official, the Superintendent of Insurance, may be

appointed as liquidator of an insolvent company. We discuss his status and powers when so appointed in further detail below.

For more than a decade, while this litigation and the companion state case were pending, the Superintendent administered the affairs of Manhattan, marshaled its assets and invested them, paid and discharged obligations, adjusted policy claims, and embarked upon an orderly winding up of Manhattan's corporate existence.

Following the decision of the Supreme Court in this matter on November 8, 1971, the Superintendent evaluated his position in this litigation and concluded to settle this and the companion state action for \$1,000,000.00, to be paid by seven defendants (excluding New England Note Corporation, Sweeney and Bourne) and exchange releases with all defendants. He did so, by agreement dated as of June 8, 1972. His reasoned analysis in doing so finds best expression in the later report of Hon. Samuel M. Gold, a Referee appointed by the New York Supreme Court, dated June 4, 1973:

"[i]t is clear ... that the case against Bourne, Begole and Garvin, the actual conspirators who planned and consummated the plan to have Begole purchase Manhattan's stock from Bankers Life with Manhattan's own assets, is a very strong one; and that

the case against New England Note Corporation, Bourne's corporate tool, and Sweeney, who participated in covering-up the transaction after he became aware of the fraud and conversion of Manhattan's assets, is a fairly strong one.... However, Bourne, Begole and Garvin have died and it is clear ... that these five defendants are practically judgment-proof and certainly not good for any substantial judgment."

With respect to the remaining defendants, Irving Trust Company, Belgian American Banking Corporation, Belgian American Bank & Trust Company, Garvin, Bantel & Company and Bankers Life & Casualty Company, Referee Gold said op. cit.:

"it will be seen that the evidence involving the first three--the banks-- depends on inferences to be drawn tending to indicate that they did not follow sound banking practices and were negligent, thereby facilitating the use by the conspirators of their banking services to consummate their plan. Garvin, Bantel [& Company] appears to be involved only as the means by which Garvin made arrangements with the banks. Bankers Life, Manhattan's sole stockholder, which sold its Manhattan stock to Begole for \$5,000,000.00, consisting of an Irving Trust check, is not shown by any evidence in the voluminous depositions and exhibits to have had any knowledge of the fact that the actual source of the \$5,000,000.00 it received would be Manhattan's own assets or to have participated in or been connected with the fraud. There might possibly be a case against [Bankers Life] on some insolvency theory that, if an

adequate judgment is not recovered against financially responsible defendants, it should be required to return to Manhattan that portion of the \$5,000,000.00 as is needed to make claimants and creditors whole.... But, the case itself as against Bankers Life on the basis of fraud or conversion is, according to all the records, entirely unsupported."

Relying on §539(b) of the Insurance Law, quoted below, the settlement agreement of June 8, 1972 provided that the Superintendent would apply to the Supreme Court of New York County, and not this Court, for approval of the settlement, and that upon such approval the actions in both courts would be dismissed, and the settlement effected.

The Superintendent's motion for such approval was heard before Mr. Justice Markowitz of the New York County Supreme Court on October 19, 1972 and that Court, on notice to movants here, referred "the fairness of the proposed settlement" to the aforementioned Referee Gold, who was appointed as such Referee, to "hear, take evidence on the said issue and report thereon." See order filed January 2, 1973 by Justice Markowitz under New York County Clerk's Index No. 40931/63. Justice Markowitz had previously held by memorandum decision dated December 7, 1972 that he had subject matter jurisdiction to pass on the settlement by reason of

the specific provisions of Insurance Law §§526 and 539.

Movants here were parties to the subsequent proceedings before the Referee, who received evidence, and rendered a comprehensive report dated June 4, 1973, to which reference has previously been had.

An application was made in New York Supreme Court by notice of motion dated June 7, 1973, on notice to movants here, for an order confirming the Referee's report. Also, the Referee filed his affidavit of legal services, to which the Superintendent objected. By a decision and opinion dated September 23, 1973, Mr. Justice Markowitz confirmed the "well-reasoned lucid report of the distinguished Referee." In that opinion the State Court again rejected arguments made to it by these movants that there was a want of subject matter jurisdiction to approve the settlement and discontinuance of this federal action.

On October 25, 1973, an order was entered in the State Court which approved the report of the Referee, granted the petition of the Superintendent to settle both actions, and authorized and permitted him to do so. The settlement agreement was approved and ratified by the order, and the Referee's fee duly fixed, to be paid by the Superintendent.

Movants here appealed from that order. The Superintendent also appealed from that part of the order which fixed the amount and source of the Referee's fees. On September 17, 1974 the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, unanimously affirmed the determination below, without opinion. Application for leave to appeal to the New York Court of Appeals, or alternatively, for reargument, was unanimously denied by the Appellate Division, again without opinion, on December 20, 1974. The Court of Appeals of New York denied leave to appeal on February 12, 1975. No certiorari petition was filed with the United States Supreme Court. Accordingly, the New York Supreme Court's order of October 25, 1973 is final.

In the well constructed brief submitted by movants here, the questions presented are stated as follows:

1. Can the defense of res judicata predicated upon the determination of the State Court approving the settlement, be asserted in this court to justify a dismissal of the action without any hearing on the merits?

2. Did the State Court violate the procedural and substantive constitutional due process rights of MCC, its creditors, the taxpayers of the State of New York and the sole stockholder of MCC?

3. Did the State Court have power to pass upon the fairness and reasonableness of the settlement of the

exclusively federal claim predicated upon the defendants' violation of Sec. 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, and to authorize the dismissal thereof?

4. Does the determination of the State Court disregard the holding of the United States Supreme Court in Supt. of Insurance v. Bankers Life, 404 U.S. 6 (1971)?

5. Was the decision of the State Court made in disregard of provable fact and Federal and State law, thereby giving a windfall to wrongdoing defendants at the expense of MCC, the taxpayers of the State of New York, and the creditors and sole stockholder of MCC?

6. Was the determination below predicated upon a novel question of law created by the State Court in violation of established principles of Federal and State law?

7. Should the settlement be disapproved by this Court?

I

For purposes of considering the question of movants' standing here, and determining whether there is a federal interest which must be protected here notwithstanding the aforementioned determination of the State Court, and the prior decision to settle by State appointed fiduciary, we put aside any consideration of the merits of the settlement. For the argument, notwithstanding the well reasoned opinion of Referee Gold, confirmed by Supreme

Court Justice Markowitz, and affirmed on appeal by the Appellate Division of the New York Supreme Court, we assume that the settlement to be made is improvident and inadequate, and that movants are aggrieved thereby. We also assume, although it is by no means clear, that the public treasury of the State was adversely affected by the failure of the Superintendent to collect more money from defendants.

II

Movants argue correctly (Point I) that when the Superintendent was appointed Liquidator, he undertook a fiduciary obligation to Manhattan and its creditors. Whether he had an additional obligation to the taxpayers of the State of New York which Berg and Brandenburg can enforce is another question. Because it is the most simple question presented, we consider it first.

New York has not permitted its taxpayers to act as private Attorneys General, to sue errant officials to prevent waste, or review their conduct of public affairs because of generalized damage to the fisc. Application of Blaikie, 11 App.Div.2d 196, 202 N.Y.S.2d 659, (1st Dept. 1960) Glen v. Rockefeller, 61 Misc.2d 942, 307 N.Y.S.2d 46 (N.Y.Cty. 1970), aff'd. 313 N.Y.S.2d 938; St. Clair v. Yonkers

Raceway, Inc., 13 N.Y.2d 72, 242 N.Y.S.2d 43 (1963), cert. denied
375 U.S. 970.

As stated in Doolittle v. Supervisors of Broome County,
18 N.Y. 155, 162 (1858) quoted with approval in Blaikie, supra:

"Every person may legally question the constitutional validity of an act of the legislature which affects his private rights; but if a citizen may maintain an action for such a purpose in respect to his rights as a voter and taxpayer, the court may regularly be called upon to revise all laws which may be passed." (p.664 of 202 N.Y.S.2d)

Also, as held in Blaikie:

"When the capacity of the plaintiff to sue has been challenged, the rule denying an individual taxpayer the right to test the constitutionality of legislation has been enunciated consistently, unless his property rights are specifically and particularly affected thereby. See Kilbourne v. St. John, 59 N.Y.21; Schieffelin v. Komfort, 212 N.Y. 520, 106 N.E. 675, L.R.A.1915D, 485; Bull v. Stichman, 273 App.Div. 311, 78 N.Y.S.2d 279."

Plaintiffs here as taxpayers, in their own right or representatively, lack standing to litigate the reasonableness or propriety of the settlement.

We conclude this aspect of the matter by quoting the cogent expression of Morton J. Schlossberg, Esq., counsel to the Superintendent,

in an affidavit sworn to December 24, 1974, and filed in the Court of Appeals of New York:

"Counsel no more represents the taxpayers of this State than he represents the man on the moon."

Nor could he ever do so. No federal constitutional requirement exists for a state to grant its litigious citizens in their capacity as taxpayers, any power to invoke judicial assistance for those faults in the conduct of government best resolved by recourse to the ballot. Efforts to create such a remedy have failed of adoption in New York. See Article I, §2 of the proposed Constitution of New York, rejected in the November 1967 general election.

III

This action is a private action.^{2/} Manhattan is a privately owned corporation. If it were other than an insurance company, this litigation could have been brought by its successor management, or by an assignee for the benefit of creditors existing under state law.

If, as noted before, the Superintendent were a private party who had been defrauded in the typical §10(b) case, e.g. a

ribbon clerk who had been plundered of his life savings by a bucket shop, he could, whenever satisfied by the terms of an out of court settlement proposed to him by the wrongdoers, settle and discontinue his action.^{3/}

Movants urge that simply because a complaint in this case states a good claim under §10(b) of the Securities Exchange Act of 1934 (15 U.S.C. §78j(b)), the state court has no jurisdiction to pass upon the fairness and adequacy of the settlement. They rely principally on the plain meaning of §27 of the 1934 Act (15 U.S.C. §78aa). That statute clearly grants to the District Courts of the United States exclusive jurisdiction of violations of §10(b). Movants then argue that because the state court lacks subject matter jurisdiction of the §10(b) claim, any final decision of the state court approving a settlement of the §10(b) claim should not have res judicata effect in the federal court.

This is a non sequitur of the worst sort. While the state court cannot adjudicate a §10(b) claim, it can adjudicate the reasonableness and propriety of the exercise of his discretion by the State's fiduciary in settling such a claim.

Here, the Superintendent is a state representative fiduciary acting for the state court. Knickerbocker Agency v. Holz, 4 N.Y.2d

249, 173 N.Y.S.2d 602 (1958).^{4/} The relief he sought from the state courts was the authority to settle. The state courts did not thereby adjudicate the §10(b) claim, they adjudicated rather, the question of whether the Superintendent was acting fairly and reasonably in the exercise of his discretion in concluding to accept a settlement proffered to him by such of the alleged wrongdoers in this case who remain solvent.

The interest at stake in the management and liquidation of insurance companies such as Manhattan is exclusively a state interest. Federal public policy is found only in the acts of Congress and in federal court decisions. In none of these do we find any conflicting or overriding policy of a federal nature which interferes with the state's activities in regulating the insurance industry or the administration of defunct insurers, or preventing the state's liquidator from compromising any civil claim. See Insurance Law, §510, *et seq.* Indeed, New York holds [*Knickerbocker Agency v. Holz*, 4 N.Y.2d 249, 250, 173 N.Y.S.2d 602, 606 (1958)] that:

"Article XVI of the Insurance Law (§§ 510-546), insofar as it relates to the liquidation of insolvent insurance companies, is intended to and does furnish a 'comprehensive, economical, and efficient method for

the winding up of the affairs' of such insurance companies by the Superintendent of Insurance (Motlow v. Southern Holding & Securities Corp., 8 Cir., 95 F.2d 721, 724, 119 A.L.R. 1331). Those provisions of the Insurance Law 'are exclusive in their operation and furnish a complete procedure for the protection of the rights of all parties interested' (Matter of Lawyers Title & Guar. Co., 254 App.Div. 491, 492, 5 N.Y.S.2d 484, 486). When an insurance company is, or may become, insolvent, the Superintendent of Insurance may, under article XVI, apply to the Supreme Court for an order of liquidation (Insurance Law, §§ 513, 526). Under the order of liquidation, the Superintendent of Insurance is vested by operation of law 'with the title to all of the property, contracts and rights of action' of the defunct insurance company (Insurance Law, § 514). The Supreme Court, in the liquidation proceeding, must take cognizance of the interests of the policyholders, creditors, stockholders, and the public (Insurance Law, § 526), and it may issue such orders 'as may be deemed necessary to prevent interference with the superintendent or the proceeding, or waste of the assets of the insurer' (Insurance Law, § 528). Clearly does the plan emerge that the Supreme Court, with the agency of the Superintendent of Insurance, was intended to have exclusive jurisdiction of claims both for and against an insurance company in liquidation."

* In short, insofar as concerns movants, the state court had the jurisdiction and power to enforce state policy and be wrong, if, as is claimed here, it was wrong, in approving the settlement, and no federal interest exists which requires this Court to override that determination.

Motlow v. Southern Holding & Securities Corp., 95 F.2d 721 (8th Cir. 1938) involved a controversy similar on its facts.

There, Motlow, a creditor of a New York insurer being liquidated under the same statutory procedures as is Manhattan, sought to enforce claims of the insurer against those who had procured a fraudulent transfer of its assets, thereby rendering it insolvent. The Superintendent of Insurance of New York, as liquidator of the insurer, had failed and refused to attempt to recover the assets said to have been transferred wrongfully. In affirming a decree dismissing the bill, the Court held (pp. 724-25):

"The statutes of New York relative to the liquidation of insolvent insurance companies [statutory citations omitted] are intended to and do furnish a comprehensive, economical, and efficient method for the winding up of the affairs of domestic insurance companies by the superintendent of insurance of New York for the benefit of all creditors. The liquidation is intrusted to the official of the state who should be best qualified by training and experience for that purpose. Liquidation is effected by an order of the Supreme Court of the state of New York. Sections 403, 404. Upon the entry of such an order the superintendent of insurance, as liquidator, becomes the statutory successor of the corporation and is vested by operation of law with title to all of its assets, including choses in action. Section 404, subd. 2d. He is given the right to avoid fraudulent transfers and to recover property wrongfully transferred. Section 418, subd. 3. He is also given the right to sell or otherwise dispose of the real and personal property, or any part thereof, with the approval of the court. Section 421. [footnote omitted].

It thus appears that the superintendent of insurance of the state of New York, as liquidator of an insolvent domestic insurance company, is not given an uncontrolled

discretion over the administration of the estate of the insolvent or over the disposition of its assets, but that his acts are measurably subject to the direction, supervision, and control of the court entering the order of liquidation.

The Circuit Court of Appeals of the Second Circuit, in the case of *Tolfree v. New York Title & Mortgage Co., et al.*, 72 F.2d 702, certiorari denied, 293 U.S. 619, 55 S.Ct. 216, 79 L.Ed. 707, has held that, by virtue of a similar order of court and article 11 of the New York Insurance Law, section 400, et seq., the superintendent of insurance became in effect a receiver under the supervision of the state court.

Whether the liquidator more nearly resembles a receiver than a trustee in bankruptcy (*Glenn on Liquidation*, pages 16, 17, 18), or 'the successor to the corporation, and not a mere receiver' (*Clark v. Williard*, 292 U.S. 112, 120, 54 S.Ct. 615, 619, 78 L.Ed. 1160), we do not consider of controlling consequence in this case.

* * *

Furthermore, we think there is no more reason for making the administration of the estate of an insolvent insurance company by a statutory liquidator under proceedings commenced in the court of a state, subject to the jurisdiction of other courts, than for making the administration of such an estate in the hands of an equity receiver appointed by a court, subject to the jurisdiction of other courts. The reasons for non-interference are the same in either case. Experience has demonstrated that, in order to secure an economical, efficient and orderly liquidation and distribution of the assets of an insolvent corporation for the benefit of all creditors and stockholders, it is essential that the title, custody, and control of the assets be intrusted to a single management under the supervision of one court. Hence other courts, except when called upon by the court of primary jurisdiction for assistance, are excluded from participation. This should be particularly true as

to proceedings for the liquidation of insolvent insurance companies, for the reasons adverted to by Mr. Justice Cardozo in *Clark v. Williard*, [supra]. See, also, Glenn on Liquidation, pages 409, 410, §§ 278, 279, 280.

In *Lion Bonding & Surety Co. v. Karatz*, 262 U.S. 77, 43 S.Ct. 480, 67 L.Ed. 871, the right of the Department of Trade and Commerce of Nebraska to liquidate the Lion Bonding Company, a domestic insurance company of that state, in accordance with the statutes of Nebraska and the orders of a state court of Nebraska entered pursuant to such statutes, free from interference by other courts, was involved; and the Supreme Court applied the rule that 'where a court of competent jurisdiction has, by appropriate proceedings, taken property into its possession through its officers, the property is thereby withdrawn from the jurisdiction of all other courts.' 262 U.S. 77, 88, 89, 43 S.Ct. 480, 67 L.Ed. 871.

In *O'Neil v. Welch*, 3 Cir., 245 F. 261, the right of the insurance commissioner of Pennsylvania to liquidate the Union Casualty Company of Pennsylvania pursuant to the statutes of that state was questioned. The court said, 245 F. 261, at page 269: 'The act of the State in bringing suit was the exercise of a governmental power; the acts of the State court in pursuing a procedure established to insure the full accomplishment of that power stand for dominion over the entire subject matter in litigation, and subject the property of the corporation to its jurisdiction for the full purpose of the judicial proceeding, which includes its possession, liquidation and distribution. We are therefore of opinion that the State court acquired jurisdiction not only of the corporation but of its property upon the inception of the proceeding, and, being first to acquire jurisdiction, is entitled to retain it until the State has wrought its function and until the jurisdiction invoked has been exhausted.'

In *Tolfree v. New York Title & Mortgage Co.*, 2 Cir., 72 F.2d 702, already referred to, the court held that the superintendent of insurance, when authorized by a state court order to take possession of property of an insuring company, became, in effect, a receiver under the supervision of the state court, and that its property was in *custodia legis*. The court said, 72 F.2d 702, at page 704: 'In such circumstances, under established rules of law, the federal courts should not interfere with the possession of the state court. *Lion Bonding & Surety Co. v. Karatz*, 262 U.S. 77, 43 S.Ct. 480, 67 L.Ed. 871; *Harkin v. Brundage*, 276 U.S. 36, 48 S.Ct. 268, 72 L.Ed. 457; *Farmers' Loan & Trust Co. v. Lake Street Elevated Railroad Co.*, 117 U.S. 51 61, 20 S.Ct. 564, 44 L.Ed. 667; *O'Neil v. Welch* (C.C.A.) 245 F. 261; *People's Trust Co. v. United States* (C.C.A.) 23 F.2d 381. ***"

Within the reasoning of *Motlow*, *supra*, and cases cited therein, Manhattan and its property were in custodia legis at all times since May 1963 when Manhattan was declared insolvent and the State court order appointing the Superintendent as liquidator, previously referred to, was entered.

IV

Movants assert a constitutional due process claim. This claim is based upon (1) a limitation placed upon cross-examination by the Referee, and (2) the admission into evidence before the Referee of two documents claimed to be incompetent. The Court has

read the record before the Referee, and concurs in the apparent conclusion of the State Court, that the procedures followed were not so erroneous as to constitute a denial of due process, rising to constitutional dimensions; if they were, the proper procedure was to apply to the Supreme Court of the United States for certiorari from the final State Court determinations approving and ratifying the settlement. These issues were presented to the New York courts. Accordingly, this Court lacks jurisdiction to review these state court determinations of federal constitutional questions. Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923); Tang v. Appellate Division of N.Y. Sup. Ct. First Dept., 487 F.2d 138 (2d Cir. 1973).

V

Section 539 of the Insurance Law provides in relevant part as follows:

"The Superintendent may, subject to the approval of the court, ...

(b) sell or compound all doubtful or uncollectible debts or claims owed by or owing to such insurer."

A clear reading of the statute indicates that the court referred to therein means the State Court. We do not think, as

movants apparently contend, that the state legislature intended thereby, nor could it, foist upon this Court, subject matter jurisdiction to adjudicate the validity of the exercise of his discretion by a state appointed fiduciary. For example, let us assume that it was necessary for the Superintendent to pursue some claim belonging to Manhattan by action in the courts of Canada, or some other foreign nation granting access to its courts by American citizens. This could readily happen where an obligor had absconded, owing Manhattan money, and was not subject to in personam jurisdiction in New York. Clearly, the Superintendent, to the extent permitted, would have access to the foreign court to enforce the claim. Who would argue that a fair construction of the statute, §539, requires the foreign court to approve or disapprove a subsequent compromise?

This case is neither a class nor a derivative action. Rules 23 and 23.1, F.R.Civ.P., accordingly, are inapplicable. Nor should this Court convert the suit which has been brought as an individual action, into a class action. United States v. Communist Party of the United States, 209 F.Supp. 132 (S.D.N.Y. 1962).

In our view, plaintiff Superintendent when seeking in this Court to enforce a claim of an insurance company in dissolution is entitled to all the rights of a private litigant, including the absolute right, if authorized by the State court whose agent he is, to settle or discontinue on terms he considers proper, approved by the power to which he is answerable for the discharge of his duty.

We disclaim any reliance here on the abstention doctrine, which, as the Supreme Court held in Allegheny County v. Mashuda Co., 360 U.S. 185, 188 (1959) is "an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it." Rather, we conclude that any controversy as to whether the Superintendent is discharging his duties adequately by settling his case, is not a controversy which is or can be properly before us.

CONCLUSION

The motion to intervene is denied. The motion to enjoin plaintiff from settling his litigation in accordance with the approval granted him by the State Court, is also denied.

Settle order on five (5) days notice, which order may

provide that the consummation of the settlement, delivery of the releases, and the filing of the stipulation of discontinuance of this action shall be stayed for a period of fifteen (15) days from the date of entry thereof, for the purpose of permitting movants, if so advised, to apply to the Court of Appeals for a stay pending appeal. Although impressed by the quality of the advocacy in behalf of movants, the organization of the arguments made, and their apparent sincerity, this Court would decline any further or additional stay, if applied for, for want of merit. See Rule 8(a), F.R.App.P.

Dated: New York, New York
June 3, 1975

Charles L. Briant Jr.

CHARLES L. BRIANT, JR.
U. S. D. J.

FOOTNOTES

1. But the prior case of A.T. Brod & Co. v. Perlow, 375 F.2d 393 (2d Cir. 1967) cited with approval in footnote 7 of Mr. Justice Douglas' opinion, supra, had previously held:

"'[We do not] think it sound to dismiss a complaint merely because the alleged scheme does not involve the type of fraud that is 'usually associated with the sale or purchase of securities.' We believe that § 10(b) and Rule 10b-5 prohibit all fraudulent schemes in connection with the purchase or sale of securities, whether the artifices employed involve a garden type variety of fraud, or present a unique form of deception. Novel or atypical methods should not provide immunity from the securities laws.'"

And Judge Hays' dissent in this case in the Court of Appeals (P.361 of 430 F.2d) suggested a factual basis (sale of stock) to uphold the complaint, different than the one eventually adopted.

2. As noted in Jennings and Marsh, Securities Regulation (1972 ed.), p. 1059:

"Neither the statute nor the Rule purports to give any private right of action to a person injured by a violation thereof, but merely makes certain conduct 'unlawful.' Since other sections of the Securities Act of 1933 and the Securities Exchange Act of 1934 which were intended to create civil liability carefully spell out that liability and its limitations, it can be forcefully argued that Section 10(b)

was not intended to create any civil liability. However, every case which considered the question had held, in accord with [Fratt v. Robinson, 203 F.2d 627 (9th Cir. 1953)] that a private right of action is available for a violation of the Rule, and this question was finally settled by the United States Supreme Court in Superintendent of Insurance v. Bankers Life and Casualty Company, 404 U.S. 6 , which disposed of it casually in a footnote."

3. Court approval granted to stipulations entered upon such settlements where plaintiffs are sui juris and suing in their own right, is formal only, and required in this District solely for the purpose of maintaining docket control. Indeed, such orders may be signed by the Clerk of the Court, although such practice has fallen into disuse since the adoption of the Individual Assignment Calendar. See Rule 12(b) of the General Rules for the Southern and Eastern Districts of New York.

4. The status of the Superintendent as liquidator is that of a New York State statutory receiver, acting under the supervision of the New York Supreme Court, Tolfree v. New York Title & Mortgage Co., 72 F.2d 702, 704 (2d Cir. 1934); Matter of Lawyers Mortgage Co. (Russell), 293 N.Y. 159 (1944).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
SUPERINTENDENT OF INSURANCE OF THE :
STATE OF NEW YORK, AS LIQUIDATOR OF :
MANHATTAN CASUALTY COMPANY, :
:

Plaintiff, :

-against- :

63 Civ. 2490 (CLB)

BANKERS LIFE AND CASUALTY COMPANY, :
IRVING TRUST COMPANY, BELGIAN AMERICAN :
BANKING CORPORATION, BELGIAN AMERICAN :
BANK & TRUST COMPANY, GARVIN, BANTEL & :
COMPANY, NEW ENGLAND NOTE CORPORATION, :
THE ESTATE OF GEORGE K. GARVIN by RUTH :
M. GARVIN, THE ESTATE OF JAMES F. :
BEGOLE by PATRICIA C.R. BEGOLE, as :
Executrix, JOHN F. SWEENEY, THE ESTATE :
OF STANDISH T. BOURNE, by STANDISH T. :
BOURNE, JR., :

NOTICE OF MOTION
FOR SUNDRY RELIEF

-----X
S I R S:

TAKE NOTICE that upon the annexed affidavit of NORMAN ANNENBERG, verified the 6th day of February, 1975, and the Notice dated November 19, 1974 filed by Norman Annenberg, Esq., a motion will be made on the 25th day of February, 1975 at 9:30 a.m. or as soon thereafter as counsel can be heard, before Judge Charles L. Brieant in Courtroom 706 for an order:

1. Granting Harry Berg, on behalf of all creditors of Manhattan Casualty Company ("MCC"), Florence H. Brandenburg as Executrix of the Estate of Matthew H. Brandenburg, as sole stock-

holder of MCC, and Harry Berg and Florence H. Brandenburg, on behalf of the taxpayers of the State of New York, leave to intervene for the purpose of protecting the rights of MCC, its creditors, the sole stockholder of MCC, and the taxpayers of the State of New York;

2. Enjoining the parties to this action from interposing in the action, any defense based upon any judgment entered in the State Court of this State, which approves a settlement agreement made as of June 8, 1972 and from using same to seek a dismissal of this case;

3. Enjoining the parties from releasing the defendants, on behalf of MCC, of the claims asserted in this case on behalf of MCC;

4. Granting the intervenors the right to amend the complaint in this action to assert, as a pendent claim, the claim asserted in the Supreme Court of the State of New York, County of New York, Index No. 11358/65;

5. Determining that the Supreme Court of the State of New York, had no jurisdiction to pass upon the fairness and reasonableness of the settlement agreement made as of June 8, 1972 and that any order or judgment of the courts of the State of New York is a nullity insofar as the action in this court is concerned;

6. Determining that in the State Court, MCC, the creditors of MCC, the sole stockholder of MCC, and the taxpayers of the State of New York were deprived of procedural and substantive due process;

7. Disapproving the settlement agreement made as of June 8, 1973;

8. For such other and further relief as may be just.

The grounds upon which the above relief is requested, are set forth in detail in the attached memorandum which is hereby made a part hereof.

Your etc.,

Norman Annenberg

NORMAN ANNENBERG, as Attorney for Harry Berg, on behalf of all creditors of MCC, for Florence H. Brandenburg, Executrix, as sole stockholder of MCC, of Harry Berg and Florence H. Brandenburg, on behalf of the Taxpayers of the State of New York.

TO:

JOSEPH J. MARCHESO
1251 Avenue of the Americas
Rockefeller Center
New York, New York 10020

BANKERS LIFE AND CASUALTY COMPANY
Jacobs, Persinger & Parker
70 Pine Street
New York, New York

IRVING TRUST COMPANY
Winthrop, Stimpson, Putnam & Roberts
40 Wall Street
New York, New York

EUROPEAN-AMERICAN BANKING CORPORATION
and EUROPEAN-AMERICAN BANK & TRUST
COMPANY
Sullivan & Cromwell
48 Wall Street
New York, New York

GARVIN, BANTEL & CO. and
Estate of George K. Garvin
Seits & Shapiro
110 East 42 Street
New York, New York

ESTATE OF JAMES F. BEGOLE
Jillson, Bedford & Hoppen
115 Broadway
New York, New York

NEW ENGLAND NOTE CORPORATION
c/o Clerk of the Court
United States District Court
United States Courthouse
Foley Square
New York, New York 10007

ESTATE OF STANDISH T. BOURNE
by Standish T. Bourne, Jr.
Standish T. Bourne, Jr.
R. D. #2
Allentown, Pa. 18102

JOHN F. SWEENEY
c/o Clerk of the Court
United States District Court
United States Courthouse
Foley Square
New York, New York 10007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
SUPERINTENDENT OF INSURANCE OF THE :
STATE OF NEW YORK, AS LIQUIDATOR OF :
MANHATTAN CASUALTY COMPANY, :
:

Plaintiff, :

-against- :

63 Civ. 2490 (CLB)

BANKERS LIFE AND CASUALTY COMPANY, :
IRVING TRUST COMPANY, BELGIAN AMERICAN :
BANKING CORPORATION, BELGIAN AMERICAN :
BANK & TRUST COMPANY, GARVIN, BANTEL & :
COMPANY, NEW ENGLAND NOTE CORPORATION, :
THE ESTATE OF GEORGE K. GARVIN by RUTH :
M. GARVIN, THE ESTATE OF JAMES F. :
REGOLE by PATRICIA C.R. REGOLE, as :
Executrix, JOHN F. SWEENEY, THE ESTATE :
OF STANDISH T. BOURNE, by STANDISH T. :
BOURNE, JR., :

AFFIDAVIT

Defendants. :
-----X

STATE OF NEW YORK)

: ss.

COUNTY OF NEW YORK)

NORMAN ANNENBERG, being duly sworn deposes and says:

I am the attorney for the proposed intervenors. I re-
presented them in the proceedings in the State Court and am fa-
miliar with the facts. In the State Court they were objectors
to the settlement made by the Superintendent of Insurance of the
State of New York ("Supt."), to settle claims made by the Supt.
on behalf of Manhattan Casualty Company ("MCC").

This is an affidavit in support of the motion made by the intervenors for the relief requested in their Notice of Motion.

Basically, the intervenors are asking this court to pass upon and disapprove as unfair and inadequate, a settlement agreement made by the Supt. in a document dated as of June 8, 1972. By that document the Supt. sought to settle and compromise two actions which were brought by him on behalf of MCC, an insurance company in liquidation. The main action, the within action, was commenced in this court on August 19, 1963, and was predicated upon the claim that the defendants had defrauded MCC in violation of Sec. 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 of the Rules and Regulations of the Securities Exchange Commission thereunder.

The other action was brought in the Supreme Court New York County, was based upon similar facts as the Federal case, but pleaded common law fraud, conversion and negligence. The State Court action was commenced on or about July 23, 1965, two years after the Federal action, and virtually no proceedings were conducted therein. All significant proceedings took place in this court even to the point of taking it to the United States Supreme Court for the purpose of establishing that a Sec. 10(b)

claim was asserted over which the Federal courts had jurisdiction, where the well known and oft cited decision entitled Supt. of Ins. v. Bankers Life, 404 US 6 (1971) was rendered.

The stipulation of settlement provided that the Supt. would make application to the Supreme Court, New York County, and not the Federal Court, for approval of the settlement, and upon approval by the State Court, the actions in both courts would be dismissed, the defendants would be granted general releases, and one million dollars would be paid to the Supt. on behalf of MCC. Pursuant thereto, the Supt. made an application to the State Supreme Court for approval of the settlement. Intervenor Berg on behalf of MCC's creditors, and Brandenburg, as sole stockholder of MCC, appeared to oppose the settlement. In addition to claiming that the settlement was unreasonable and inadequate, the objectors claimed that the State Court lacked jurisdiction to pass upon the exclusively Federal claim predicated upon the defendants' violation of Sec. 10(b) of the Exchange Act.

The objectors' jurisdictional challenge, predicated upon the claim that only the Federal Court had jurisdiction to pass upon the fairness and reasonableness of the settlement, was overruled by the Special Term of the State Supreme Court, which appointed a special referee to hear and report on the fairness of

the settlement. As will be shown in the memorandum submitted herewith, the State Supreme Court erred in rejecting the argument of the objectors that only the Federal Court had jurisdiction to pass upon the fairness of the settlement. As will be further shown in that memorandum, while the Special Referee purported to hold a hearing, he denied the objectors right to explore or cross examine concerning matters which were vital to any justiciable determination as to the fairness and adequacy of the settlement.

On June 4, 1973, the referee submitted his report in which he recommended court approval of the settlement. Upon motion of the Supt., the Special Term of the State Supreme Court approved the settlement in a short memorandum opinion. As will be shown in the memorandum submitted herewith, on the basis of the findings of fact made by the Special Referee, the settlement should be disapproved as unfair and inadequate.

The objectors appealed the State Supreme Court's approval of the settlement, to the Appellate Division, First Department. The Appellate Division unanimously affirmed the determination below without opinion. The objectors moved in the Appellate Division for reargument, or in the alternative, for leave to appeal to the Court of Appeals. This application was unani-

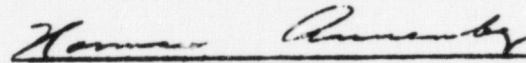
mously denied without opinion by the Appellate Division. On December 20, 1974, the objectors moved in the State Court of Appeals for leave to appeal to the State Court of Appeals. That motion has not yet been determined.

In the meantime, on November 19, 1974, the intervenors-objectors filed in this court, a Notice stating that they intended, on behalf of MCC, the creditors of MCC, the sole stockholder of MCC and the taxpayers of the State of New York, to object to any dismissal of this action pursuant to any order of the courts of the State of New York or any agreement between the plaintiff and defendants, and that pursuant to Rule 23.1 of the FRCP, the parties were required to give notice to the objectors, concerning any endeavor to obtain dismissal of the action. Pursuant to said Notice, Judge Charles L. Brieant, to whom this case has been assigned, requested counsel to appear before him on January 27, 1975. As a result of the proceedings which took place at that time, Judge Brieant directed the intervenors to make the within motion even though the State Court of Appeals had not yet determined the motion for leave to appeal thereto.

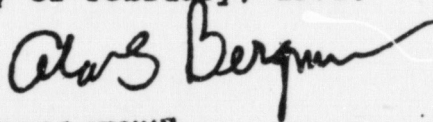
In the memorandum which is submitted herewith, the intervenors have substantiated their fact allegations by reference to the Appendices of the Supt. and the Objectors in the Appellate

Division. A copy of each of said appendices will be filed herewith for the benefit of the court.

For the reasons which appear in the memorandum in support of this motion, which is submitted herewith, deponent respectfully prays that the relief requested in the Notice of Motion be granted.


NORMAN ANNENBERG

Sworn to before me this 6th
day of February, 1975.



ALAN S. BERGMAN
Notary Public, State of New York
No. 314,258530
Qualified in New York County
Commission Expires March 30, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x

Superintendent of Insurance of the	:	
State of New York- as Liquidator of	:	
MANHATTAN CASUALTY COMPANY	:	
 Plaintiff,	:	
 -against-	:	
BANKERS LIFE AND CASUALTY COMPANY,	:	63 Civ. 2490 (CLB)
IPVING TRUST COMPANY, BELGIAN AMERICAN	:	
BANKING CORPORATION, BELGIAN AMERICAN	:	
BANK & TRUST COMPANY, GARVIN, BANTELL &	:	
COMPANY, NEW ENGLAND NOTE CORPORATION,	:	
THE ESTATE OF GEORGE K. GARVIN by RUTH	:	
M. GARVIN, THE ESTATE OF JAMES F.	:	
BEGOLE by PATRICIA C. R. BEGOLE, as	:	
Executrix, JOHN F. SWEENEY, THE ESTATE	:	
OF STANDISH T. BOURNE, by STANDISH T.	:	
BOURNE, JR.,	:	
 Defendants.	:	

----- x

STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

MORTON J. SCHLOSSBERG, being duly sworn, deposes and says, that he is a partner of Joseph J. Marcheso, attorney for plaintiff, Superintendent of Insurance, and he submits this affidavit in opposition to the motion of the "intervenors-objectors" for sundry relief.

I must assume that counsel for the objectors used the term "sundry relief" because he had as much difficulty attempting to define what he was seeking as I have had attempting to determine the relief requested. My task might have been eased had counsel

cited the applicable Rules or statutory authority. I can only surmise that his failure to do so was brought about because no such authority exists.

Perhaps counsel has lost sight of the fact that he is no longer litigating issues in the state court. Except for the purported intervention motion, the relief he now seeks is precisely the same relief he sought in the Supreme Court of New York, the Appellate Division and the New York Court of Appeals. Indeed, his supporting memorandum is a virtual duplication of his brief to the Court of Appeals in support of his motion for leave to appeal.

One would have thought that having seen each of these arguments summarily rejected by three courts (the Court of Appeals denied objectors' motion for leave to appeal on February 12, 1975), counsel would have either abandoned his argument or at least offer something new. Alas, such is not to be the case and for the fourth time the same baseless arguments are advanced.

What may have been at least an argument to be advanced in the state court does not even come within the jurisdiction of this Court or within the purview of the instant proceeding. Objectors persist in arguing that the settlement is not fair and reasonable in spite of the fact that the highest court of New York has ruled that it is. Furthermore, the adequacy of the settlement is of no consequence in the voluntary discontinuance of the present action. The dismissal of this case is governed solely by the provisions of Rule 41(a) of the Federal Rules of

Civil Procedure and objectors have utterly failed in their attempt to bring the action within such Rules as require approval of the court (e.g., Rule 23 or Rule 23.1).

Objectors here challenge the authority of the state courts to determine the fairness and reasonableness of the settlement. Of what consequence is that determination to the instant action? The Superintendent was required by state law to seek approval of the settlement. Having received such approval he is now free to discontinue the action in this Court without further approval.

And on what authority do the objectors rely in asking this Court to determine that they were denied due process in the hearings before the Referee? What was there involved was an independent proceeding in the state court having nothing whatever to do with the issues in the instant case. This Court simply has no jurisdiction to review the determinations of the state courts in a separate and independent proceeding. Objectors raised the due process argument up to the highest court in New York and each time it was rejected. Any remedy which may still exist does not lie within the four corners of this litigation and review of these issues must be denied herein.

The question of the fairness of the settlement and related issues were properly heard and determined in the state courts. Objectors' attempts to remove these matters to the federal court were summarily rejected. Having failed in their efforts, objectors now seek to relitigate all of those issues

in a federal forum where jurisdiction is lacking. They are clearly in error.

The motive of the objectors in seeking their "sundry" relief is capsulized at page 2 of Annenberg's supporting affidavit where he states: "Basically, the intervenors are asking this court to pass upon and disapprove as unfair and inadequate, a settlement agreement made by the Supt. in a document dated as of June 8, 1972." At the outset I should point out that counsel has assumed that his clients are indeed intervenors in the pending action. While it is difficult to ascertain precisely what status the objectors have, if any, as shown by the accompanying memorandum of law in opposition to the motions, it is clear that they are not intervenors. One does not become an intervenor simply by adopting the label any more than one can claim to be entitled to notice of the discontinuance of an action by reference to Rule 23.1.

Leaving aside the procedural defects (application not timely made, failure to annex to a proposed pleading), I submit that there is no basis upon which intervention can be granted to the objectors. The claim of intervention is pressed by (a) Berg, a claimant, (b) Estate of Brandenburg, alleged to be the sole stockholders of MCC, (c) the creditors of MCC, and (d) the taxpayers of the State of New York.

(a) Berg. Berg had a claim against MCC in the amount of \$79,000. The Superintendent objected to the claim and a referee allowed \$2,500. Berg has appealed but has not yet

perfected his appeal. In any event, the Superintendent has established a reserve of \$80,000 on this claim over and above the proposed settlement so that Berg is fully protected should he prevail on his appeal. He has no standing in the present action and no right to intervene.

(b) Estate of Brandenburg. The stock of MCC allegedly acquired by Brandenburg was the same stock acquired by Begole by virtue of the fraud committed by Begole and others against MCC. It is tainted stock and the Estate has no greater rights to participate in any distribution than the rights of Begole. As a defrauder, Begole had no claim against the assets of MCC nor does the Estate. In addition, separate actions begun by Brandenburg in this Court and in the state court against the defendants herein were either dismissed as a matter of law or voluntarily discontinued by Brandenburg. The Estate has waived its right to join in this proceeding and intervention should be denied.

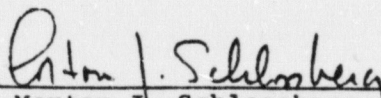
(c) The Creditors of MCC. The Superintendent, pursuant to the Insurance Law, was vested with the obligation to represent the creditors of MCC. In so doing he commenced this action and has succeeded in bringing about a settlement which has not only been held to be fair and reasonable by the highest court of New York, but which will result in payment in full of all proper creditors' claims. The creditors of MCC have been and continue to be properly and adequately represented by the Superintendent and there exists no basis in law or fact for intervention on their behalf by counsel for the objectors. It should be noted

that except for Berg, who has no standing, counsel cannot point to a single creditor he claims to represent.

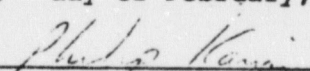
(d) The Taxpayers of the State of New York. As shown in the accompanying memorandum of law, no taxpayers' funds have been or will be used in the satisfaction of claims against MCC. Each of the special funds are created by means of assessments against insurance companies doing business in New York. Further, except for administration expenses, these funds will be reimbursed in full for the monies advanced to pay claims against MCC. The taxpayers having no interest in this litigation, a claim to intervene on their behalf must be denied.

The question of whether or not the settlement is fair and reasonable has been decided in favor of the Superintendent by the Court of Appeals of New York. It is no longer an issue in the state court and it is not now nor was it ever an issue in the present action. Each and every one of the "sundry" motions addressed to the settlement should be denied. The objectors have no standing to appear in this proceeding as intervenors and so much of the motions seeking intervention must similarly be denied.

WHEREFORE, your deponent respectfully prays that an order be entered herein denying objectors' motions for "sundry relief" in their entirety.


Morton J. Schlossberg

Sworn to before me this
18th day of February, 1975.


Notary Public

PHILIP KAZIN
Notary Public State of New York
No. 411111 County
Comm. Expires March 30, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x

SUPERINTENDENT OF INSURANCE OF THE	:	
STATE OF NEW YORK, AS LIQUIDATOR OF	:	
MANHATTAN CASUALTY COMPANY,	:	63 Civ. 2490 (CLB)
Plaintiff,	:	<u>Affidavit</u>
-against-	:	
BANKERS LIFE AND CASUALTY COMPANY,	:	
<u>et al.</u> ,	:	
Defendants.	:	

----- x

STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

MICHAEL M. MANEY, being duly sworn, deposes and
says:

I am a member of the bar of this Court and of the
firm of Sullivan & Cromwell, attorneys for defendants
European-American Bank & Trust Company and European-American
Banking Corporation, as successors to Belgian-American Bank
& Trust Company and Belgian-American Banking Corporation
(hereinafter "Belgian-American"). I submit this affidavit
in opposition to the motion of applicants Berg and Mrs.
Brandenburg to intervene and for other relief. The function
of this affidavit is to bring before the Court a brief
synopsis of events which has taken place in this and
related actions over the twelve years that this action has
been pending.

The events which are set forth as the allegations
of the complaint occurred primarily between January 1962 and
January 1963.

An investigation conducted by the New York State Insurance Department into the financial affairs of Manhattan Casualty Company was, on information and belief, commenced sometime in May 1963. At the time of that investigation Mr. James F. Begole, who was at that time the registered owner of all of the stock of Manhattan Casualty Company, was subpoenaed to appear on May 16, 1963 before the Insurance Department. Matthew H. Brandenburg, Esq., on behalf of whose estate Mrs. Brandenburg is moving in this action, was retained as counsel for Mr. Begole to represent him before the New York State Insurance Department. A copy of a stipulation, executed on the application of the Superintendent of Insurance for an order apprehending Mr. Begole, which stipulation is signed by Mr. Brandenburg as attorney for Mr. Begole, is attached hereto as Exhibit A.

On May 24, 1963, the corporation charter of Manhattan Casualty Company was surrendered and Manhattan was liquidated by an order signed by Hon. Peter A. Quinn, a Justice of the Supreme Court, New York County. Matthew Brandenburg was noted on the record as representing his client, James F. Begole, at the liquidating proceeding. The Superintendent of Insurance was appointed liquidator by the May 24, 1963 order and brought actions in this Court, in 1963, and in the Supreme Court, in 1965. Copies of the liquidation order and the Superintendent's complaint in the Supreme Court are attached as Exhibits B and C to this affidavit.

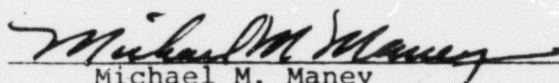
In a letter to Hon. Fioravante G. Perrotta, Deputy Superintendent of Insurance, dated June 5, 1963, Matthew Brandenburg revealed his intention, apparently formed when he first acquired his Manhattan stock from Begole as his

fee, to sue in an independent action those individuals (other than Begole and Sweeney) who were allegedly responsible for the loss of Manhattan assets. A copy of that letter is annexed hereto as Exhibit D.

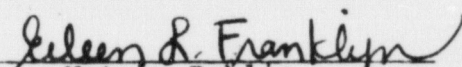
On or about March 21, 1966 Matthew Brandenburg commenced an action in this Court. The action was dismissed with regard to defendant Garvin, Bantel & Co. on September 26, 1967, and with regard to Irving Trust on May 10, 1968. With reference to Belgian-American, the action was discontinued by stipulation. A copy of the federal complaint, the Garvin, Bantel & Co. dismissal order, the Irving Trust dismissal order, and the Belgian-American stipulation and order are annexed hereto as Exhibits E, F, G and H.

A substantially identical action was also commenced by Mr. Brandenburg in New York Supreme Court on or about March 1966, and that action was dismissed on motion by judgment entered September 29, 1972. A copy of the complaint and the judgment in that action are annexed hereto as Exhibits I and J.

Upon information and belief, on or about July 7, 1968 Matthew Brandenburg died testate, naming Florence Brandenburg as sole legatee, and thereafter Mrs. Brandenburg was granted letters of administration. A copy of the decree of the Surrogate's Court is annexed hereto as Exhibit K.


Michael M. Maney

Sworn to before me this
20th day of February, 1975.


Notary Public

EILEEN L. FRANKLYN
NOTARY PUBLIC, State of New York
No. 31-1303130
Qualified in New York County
Commission Expires March 30, 1977



Letter of NORMAN ANNENBERG, Esq., Attorney for Objectors,
dated March 20, 1973, to Hon. SAMUEL M. GOLD, Referee

March 20, 1973

Honorable Samuel M. Gold
205 Madison Avenue
New York, New York
10022

Re: Manhattan Casualty Company

Dear Judge Gold:

The Superintendent of Insurance has advised you that on April 9, 1973, he will be ready to present testimony concerning the sufficiency of assets to pay claims of creditors of Manhattan Casualty Company. He has also advised you that no official financial documents will be prepared for that hearing.

In order that I may be prepared to examine any persons produced by the Superintendent to give testimony, request is made that I be furnished with copies of all working papers which will be used as a basis for any such testimony; that I be furnished with the names and relationships to the Superintendent of all persons whose testimony will be offered; and that I be granted the right to examine such persons on a pre-hearing basis at least one (1) week prior to the hearing.

Very truly yours,

Norman Annenberg

cc.: Joseph J. Marchese, Esq.
Leonard E. Minches, Esq.

LETTER OF JOSEPH J. MARCHESO, ESQ., ATTORNEY FOR SUP'T OF
INSURANCE, DATED MARCH 22, 1973, to HON. SAMUEL M. GOLD, REFEREE

LAW OFFICES
OF

JOSEPH J. MARCHESO
45 ROCKEFELLER PLAZA
NEW YORK, N.Y. 10020
(212) 843-8300

JOSEPH J. MARCHESO
MORTON J. SCHLOSBERG
WALTER I. NATHAN
PHILIP M. KAZIN

March 22, 1973

Honorable Samuel M. Gold
595 Madison Avenue
New York, New York

Re: Manhattan Casualty Company

Dear Judge Gold:

We are in receipt of a letter dated March 20, 1973 from Norman Annenberg, counsel for the objectors in the above-entitled matter.

Mr. Annenberg has already been furnished with copies of the financial statement of Manhattan as at July 31, 1967, and March 24, 1963. He has also been furnished with a copy of the statement of additional funds required to pay all claims as at December 31, 1972. These documents were prepared from the books and records of Manhattan as well as a review of all of the claim files in possession of the liquidator. To our knowledge there are no "working papers" and the testimony to be offered at the next hearing will be based on those documents already furnished to Mr. Annenberg and a review of the claim files.

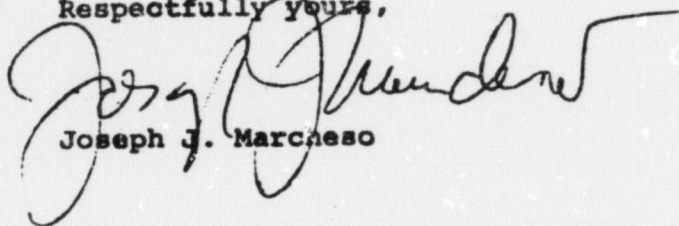
We strenuously object to Mr. Annenberg's request that he be furnished with the names and the relationships to the Superintendent of those persons who will be testifying, and his further request that he be given the right to examine these persons prior to the hearing. We know of no authority permitting such an examination, nor are we aware of any proceeding in which a prehearing examination was allowed or conducted. Mr. Annenberg will, of course, have the right and opportunity to conduct a cross-examination of any and all witnesses who will be produced by the Superintendent and we respectfully urge that his examination of witnesses be limited to the permitted and customary cross-examination at the hearing.

LETTER OF JOSEPH J. MARCHESO, ESQ., ATTORNEY FOR SUP'T OF
INSURANCE, DATED MARCH 22, 1973, to HON. SAMUEL M. GOLD, REFEREE

Hon. Samuel M. Gold
March 22, 1973
Page -two-

Should Your Honor wish to hear argument with respect
to Mr. Annenberg's request we are prepared to be present at any
time or place that Your Honor may fix, although it is our present
view that his request should be denied and that no hearing on
his application is necessary.

Respectfully yours,



Joseph J. Marcheso

:vl

cc: Hon. James W. Dowling
Norman Annenberg, Esq.

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LETTER OF HON. SAMUEL M. GOLD, REFEREE, DATED MARCH 23, 1974,
TO NORMAN ANNENBERG, ESQ., ATTORNEY FOR OBJECTORS

GOLD, FARRELL & MARKS

ATTORNEYS AND COUNSELORS AT LAW

888 MADISON AVENUE

NEW YORK, N.Y. 10022

THOMAS R. FARRELL
MARTIN R. GOLD
LEONARD M. MARKS
ERIC BRENNAN
ANDREW DINGER

(212) 835-8200

SAMUEL M. GOLD
COUNSEL

March 23, 1973

Norman Annenberg, Esq.
250 West 57th Street
New York, New York 10019

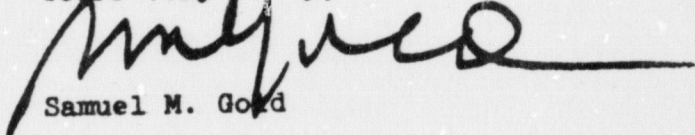
In re Manhattan Casualty Company

Dear Mr. Annenberg:

This is to acknowledge receipt of your letter of March 20, 1973 with reference to the adjourned hearing on the reference in the above-matter. I also have the reply thereto of Mr. Joseph J. Marcheso, dated March 22, 1973, a copy of which has presumably reached you.

After careful consideration of your request and the objections thereto set forth in Mr. Marcheso's letter, I beg to advise that your request is denied and that the hearing shall go on as scheduled at my office on April 9, 1973, at 10:00 A.M.

Yours very truly,


Samuel M. Gold

SMG:adh

cc: Joseph J. Marcheso, Esq.

MANHATTAN CASUALTY COMPANY IN LIQUIDATION - STATEMENT OF
ADDITIONAL FUNDS REQUIRED TO PAY ALL CLAIMS AS AT DECEMBER 31, 1972

ASSETS AND LIABILITIES DECEMBER 31, 1972

ASSETS

Cash (Free)	\$3,985,000.	
Securities (Market Value December 31, 1972)	2,620,000.	
Reinsurance Recoverable	6,000.	
Cash in Revolving	<u>75,000.</u>	
Total Assets		\$6,686,000.

LIABILITIES

Preferred Claims	\$ 406,601.	
<u>General Claims</u>		
Allowed and Reserved	\$6,655,240.	
Deferred	<u>400,000.</u>	
Total General Claims	\$7,055,240.	
Total All Claims	\$7,461,841.	
Less: Paid to Date	<u>732,547.</u>	
Balance to be Paid		<u>\$6,729,294.</u>
Deficit - December 31, 1972		(\$ 43,294.)
Estimated Future Expenses (Not Recoverable from Security Funds)	\$ 275,000.	
Estimated Future Administrative Expenses (Including Cost of Filing Final Accounting)	<u>450,000.</u>	
Total Estimated Future Expenses		(\$ 725,000.)
Total Additional Funds Required		(\$ 768,294.)

SECURITY FUNDS EXPENSE REIMBURSEMENTS
RECEIVED THRU DECEMBER 31, 1972

Stock Workmen's Compensation Security Fund	\$ 286,783.49
Stock Public Motor Vehicle Liability Security Fund (Section 330)	37,487.01
Motor Vehicle Liability Security Fund (Section 333)	<u>1,796,524.66</u>
	<u>\$2,120,795.16</u>

MANHATTAN CASUALTY COMPANY
IN LIQUIDATION
LIABILITIES AND RESERVES AS AT DECEMBER 31, 1972

PREFERRED CLAIMS

Liquidators Claim - Misc. 27 Sec. 25a
Sec. 151
Sec. 214 and 228
Chapter 320
Workmen's Compensation claims per Mr. Wilson's Reserves

Total Preferred Claims

\$ 41,864.93
125,063.31
6,820.92
9,792.65

\$ 183,541.81
223,059.61

\$ 406,601.42

GENERAL CLAIMS

	<u>Sec. 330</u>	<u>Sec. 333</u>	<u>Total</u>
New York State 330-333	\$ 46,801.65	\$4,303,629.39	\$4,350,431.04
Less Contributions Paid	<u>97,381.80</u>	<u>411,294.53</u>	<u>508,676.33</u>
		<u>\$3,892,334.86</u>	

\$3,892,334.86

Policyholders Allowed Claims
on Policyholder Allowed Claims
Suspended Claims (Incl. 330-333)

\$1,159,159.27
306,566.49
528,207.13

Additional Reserve on Claims in Suit not Reserved

300,000.00

New York State Claim under 109c (Medical Payments)
Payments made by Workmen's Compensation Security Fund
Reserve for Unpaid Claims per Wilson's Reserve
Re: Misc. 27 - Sec. 15 (8h)

\$140,033.86
23,319.86
71,578.32

\$ 234,932.04

Reserve for Disallowed Claims Before Referees

234,040.00

Total General Claims Allowed and Suspended

\$6,655,239.79

MANHATTAN CASUALTY COMPANY IN LIQUIDATION-SUMMARY OF INVENTORY OF CLAIMS
REVIEWED, EVALUATED AND RESERVED, DATED FEBRUARY-MARCH, 1973

MANHATTAN CASUALTY COMPANY IN LIQUIDATION

SUMMARY OF INVENTORY OF CLAIMS REVIEWED, EVALUATED AND RESERVED

TEAM: E. BONNELL J. RYAN R. WILSON SUPERVISOR: A. PETERMAN

	1	2	3	4	5	6	7
	TOTAL CLAIMS O/S	TO BE DISALLOWED	TO BE ADJUDICATED (1-2)-(4+5)	STATED CLAIMS	CLAIMS NOT SUITED	AMOUNT OF RESERVES	RESERVED SUB TOTALS AND TOTAL
DEFERRED PERSONAL INJURY PROPERTY DAMAGE UNLITIGATED	598	365	223	150	73	\$148,088.00	
DEFERRED GENERAL LIABILITY UNLITIGATED	143	38	105	79	26	\$191,700.00	\$339,788.00
DEFERRED PERSONAL INJURY PROPERTY DAMAGE LATE FILED CLAIMS	933	428	505	193	312	\$144,060.42	\$484,060.42
DEFERRED GENERAL LIABILITY LATE FILED CLAIMS	250	108	142	120	22	\$ 95,828.00	\$579,888.42
DEFERRED PERSONAL INJURY PROPERTY DAMAGE LATE FILED CLAIMS	17			17		\$233,059.61	\$812,948.03
DEFERRED GENERAL LIABILITY LATE FILED CLAIMS	106		196	196		\$131,018.88	\$943,986.91

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2 furnished to me by the liquidator, having
3 been picked up by him for use during the
4 interim period in preparing for this hearing,
5 his request for pre-hearing examination wit-
6 nesses and pre-hearing submission of working
7 papers was denied.

8 I did that by a letter, I think, of
9 March 23, 1973.

10 Do you want to make any comment on that?

11 MR. ANNENBERG: Yes, I would like to,
12 your Honor.

13 THE REFEREE: Yes?

14 MR. ANNENBERG: First I would like to
15 say I am going to move to strike from the record
16 the statement called "Statement of additional
17 funds required to pay all claims as of December 31,
18 1972," which your Honor said or suggested should
19 be deemed in evidence, on the ground that it is
20 hearsay and wholly not admissible into evidence.

21 Second, your Honor, we have to go down
22 to the court --

23 THE REFEREE: That application is denied.

24 Now, next.

25 MR. ANNENBERG: Also on the ground that

1 ALLAN R. PETERSON, FOR LIQUIDATOR, DIRECT

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THE REFEREE: I didn't know that until you just told me that. All right. I want to have copies of them. I don't want copies of them. I just want to look at them and return them to you.

MR. SCHLOSSBERG: They are here, sir. They will be left with you this morning.

THE REFEREE: Do you want to offer them now?

MR. MARCESO: Mr. Schlossberg will continue with the testimony.

MR. SCHLOSSBERG: Yes. Mr. Peterman is called as the next witness.

ALLAN R. PETERMAN, residing at 116 John Street Osone Park, New York, having been first duly sworn by the Referee, was examined and testified as follows:

EXAMINATION

BY MR. SCHLOSSBERG:

Q Mr. Peterman, would you state for the record your business address?

A My business is located at 116 John Street, New York City, New York. 10038 is the zip.

Q By whom are you employed?

Peterman, for Liquidator, direct 111.

A I am employed by the Superintendent of Insurance at that address.

Q Would you tell us briefly what your present duties are with the Superintendent?

A My present duties in the main are to review, evaluate and write up claims and suits that are pending against insolvent insurance carriers. This write-up ^{CONTAINS} ~~etains~~ my recommendations as to an allowance or disallowance and this recommendation is presented to a claims committee in the Liquidation Bureau.

Q How long have you been employed in the Liquidation Bureau?

A Two years.

Q Prior to that, sir, by whom were you employed?

A The Cosmopolitan Insurance Company, for a period of one year.

Q What were your duties at Cosmopolitan?

A I was a manager, supervisor, of out-of-town branch offices.

Q Prior to your employment at Cosmopolitan, by whom were you employed?

A The Aetna Insurance Company, for a period of nineteen years.

Peterman
for Liquidator, direct

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2 Q Would you tell us what your duties were at
3 the Aetna?

4 A I was supervisor of claims in the Casualty
5 Claim Department, and my duties in the main were to
6 guide and direct the staff of field adjusters in
7 the disposition of third-party claims and lawsuits.

8 Q Did your duties at Aetna and do your
9 present duties at the liquidator's office include
10 the review of claims to determine the amount of re-
11 serves to be set up against these claims?

12 A Yes, sir.

13 Q Did there come a time, Mr. Peterman,
14 when you were requested to conduct a review of the
15 open and outstanding claims involving Manhattan
16 Casualty Company?

17 A Yes, sir.

18 Q When was that, sir?

19 A Beginning -- February of this year.

20 Q Did you have assistance in the conduct
21 of this review?

22 A Yes. We made up a team.

23 Q Would you give us the names of the members
24 of your team?

25 A Mr. Edward Bonnell, Mr. John Ryan, and Mr. Robert

1
2 Wilson.

3 Q Are you familiar, Mr. Peterman, with the
4 background and experience of the members of this team?

5 A Yes, sir.

6 Q Would you tell us briefly what you know
7 about Mr. Bonnell's experience?

8 MR. ANNENBERG: I object, your Honor.

9 THE REFEREE: Overruled.

10 Q Proceed.

11 A Mr. Bonnell entered the casualty claim business
12 in 1934, and he has held various positions in casualty
13 claim departments ever since that time.

14 Mr. Ryan came into the business in 1939, and
15 in the main his experience was casualty claims work.
16 He ^{is} ~~was~~ a good claims man, but he is also an under-
17 writer, of course.

18 Mr. Wilson came into the insurance business in
19 1948, and he is thoroughly engaged in workmen's compensa-
20 tion claims.

21 Q Now, would you tell us, Mr. Peterman,
22 what you and the members of your team did in connec-
23 tion with the review of the open claims against Man-
24 hattan Casualty Company?

25 A On the onset, we put them into groups, classifica-

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2 tions, and we worked from a master list and we would
3 cull fifty to 100 files per day. As we would look
4 at each individual file, of course, each individual
5 person on the team would spend time reading the file
6 from top to bottom, trying to ascertain the exposure
7 to the liquidator, if any.

8 Q When you say reviewing the file, would
9 you tell us what sort of a review would be conducted
10 of each individual file?

11 A You would look at the inception. That is the
12 time the case was first reported. You would keep an
13 eye on liability. You would, of course, note whether it
14 was a claim or whether it was a suit. You would
15 refer to the bill of particulars; hospital records
16 were important; the social status of the claimant;
17 whether a male or female, infant; driver of the ve-
18 hicle.

19 *we would*
20 And then, with an eye on liability, I arrive
21 at a fixed dollar amount which we would call a reserve
22 for that particular claimant.

23 Q Following the review of these open
24 claims against Manhattan Casualty Company, did you
25 prepare a summary of the cases that were reviewed and
the reserves that were set up in these various

categories?

A Yes, I did.

Q I show you this document, Mr. Peterman,
and I ask you if this is the summary that was prepared under your direction.

A Yes, it is.

MR. SCHLOSSBERG: Your Honor, Mr. Peterman is going to be testifying from this summary. I have had copies made. May we have this summary marked as an exhibit -- you are not marking any. We then ask that there be deemed marked as an exhibit a summary sheet entitled Manhattan Casualty Company in liquidation, summary of inventory claims reviewed, evaluated and reserved, and it is dated February-March 1973.

(Deemed marked.)

MR. ANNENBERG: Your Honor, I object to this exhibit.

THE REFEREE: All right. Overruled.

BY MR. SCHLOSSBERG:

Q Mr. Peterman, referring first to the first column, which is entitled Classification, would you tell us, please, what is represented by the six categories that appear in this particular column?

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2 Explain what they represent.

3 A This represents the grouping of claims pend-
4 ing against ^{THE} an insolvent carrier. The first caption,
5 of course, is automobile claims, those accidents
6 that arise out of the automobile business that
7 was issued by Manhattan Casualty Company.

8 The second caption would be general liability
9 claims for those claims that arose out of their
10 general liability business, commercial risk, home-
11 owners' claims, and the like.

12 Again, the other captions are automobile and
13 general liability, late filed claims. Same type
14 of business that generated claims. However, the
15 claimants were late in filing with the liquidator.

16 Workmen's compensation claims are those first
17 party cases where an employee is injured on the job.

18 In the last caption, we grouped all the others,
19 deferred and suspended, and they were the miscellaneous
20 type claims, burglary, fire, accident and health, dis-
21 ability and the like.

22 Q All right, sir. Now, referring to the
23 following columns, your Column 1 is entitled total
24 claims Q/S. I assume that means outstanding; is that
25 correct?

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2 A Yes, sir.

3 Q And listed in Column 1 are all of the
4 outstanding claims in each of the six categories that
5 you have just defined; is that correct?
6

7 A That is correct.

8 Q Column 2, which is headed "To be dis-
9 allowed," will you tell us, please, what that repre-
10 sents?

11 A Column 2, entitled "To be disallowed," are
12 those claims that we reviewed and we determined
13 in advance of adjudication that there was absolutely
14 no legal obligations or responsibilities to the
15 liquidator.

16 By that I mean, the third-party claimant had
17 already been paid under another liquidator's claim
18 number. And the claim that we are disallowing is
19 simply a policyholder's claim where he asked for
20 policy protection. And at the time the third-party
21 claim was allowed, the policyholder's claim number
22 was not taken down or set off or extinguished.

23 Q Now, were there other categories of
24 cases other than the example that you have just given,
25 which fall within the second column? You mentioned,
for example, protection claims.

Peterman

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for Liquidator - direct

A Oh yes. Yes, there were other cases, but not the majority. They would be cases where an attorney lost his client, or there was a lack of interest in the claim or lack of prosecution. A stipulation of discontinuance in a lawsuit but no certificate of dismissal, closing papers were missing.

There were cases where infants were injured, but no claim was brought, the statute of limitations applied. Things of that nature.

Q Now, again referring to your summary, Column 3, which is entitled "To be adjudicated," represents, does it not, the balance of the cases listed in Column 1 less the cases to be disallowed in each category?

MR. ANNENBERG: Your Honor, I object on the ground that Mr. Schlossberg is leading. The witness should be permitted to testify.

THE REFEREE: Is that a fact, Mr. Peterman?

THE WITNESS: Yes, sir.

THE REFEREE: All right.

You might ask him, Mr. Schlossberg, but it really doesn't matter.

MR. SCHLOSSBERG: Your Honor, just in

Peterman

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for Liquidator - direct
the nature of the proceedings, it seemed to
me a little leading would expedite the mat-
ter.

THE REFEREE: All right.

BY MR. SCHLOSSBERG:

Q Would you refer to Column 4 in your
chart, which is entitled "Stated Claims"?

A Yes.

Q Would you tell us what is represented
by "Stated Claims"?

A "Stated Claims" are all of those claims where
the claimant filed a proof of claim fixing a certain--
fixing a dollar amount. It could be \$10; it could
be \$100,000, but the amount claimed for is fixed and it
is in dollars.

Q Now, Column 5, which is entitled "Claims
Not Stated," would you tell us what that represents,
Mr. Peterman?

A Exactly what it says. This is a claimant who
files a proof of claim but does not state the amount.

THE REFEREE: It is a difference between
3 and 4; is that right?

MR. SCHLOSSBERG: 4 and 5 equal 3.

THE REFEREE: The difference between

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Peterman
for Liquidator - direct

4 and 5 equals 3. That is right.

THE WITNESS: Yes, sir.

MR. SCHLOSSBERG: Together. 4 plus 5
equals 3.

THE REFEREE: Yes. That is what I
said. 73 is the difference between 223 and
150.

MR. SCHLOSSBERG: That is correct,
sir. But they are two different categories
of claims that Mr. Peterman has just explained.

THE REFEREE: All right.

BY MR. SCHLOSSBERG:

Q And Column 6, which is entitled "Amount
of Reserves," represents what?

A Column 6 entitled "Amount of Reserves" repre-
sents the amount of reserves posted by the team foll-
owing this inventory.

Q And Column 7 represents what?

A It is simply the subtotal of all reserves against
all categories, of all classes.

Q In other words, a running addition of
Column 6 as you progress down?

A Yes. A visual aid, right.

Q Based on the review of all of the open

Peterman
for Liquidator - direct

claims by you and the members of your team, have you established the total amount of reserves necessary to satisfy all of the outstanding claims involving Manhattan?

A Yes, sir.

Q What is that figure, sir.

A \$943,986.91.

Q Mr. Peterman, are you familiar with the practice of the New York State Superintendent of Insurance in conducting reviews from time to time of going insurance companies in the adequacy of reserves set up by these insurance companies in their various categories of claims?

A Yes, sir.

Q During your nineteen years with the Aetna, did you participate in these reviews conducted by the Superintendent of Insurance?

A Yes, I did.

Q Based upon your experience with Aetna as a claim supervisor and your work with the Liquidator's Office, in reviewing all of the claims of insolvent insurance companies, are you prepared to render an opinion as to the adequacy of the reserves which have been established by you and the members of your team

Peterman
for Liquidator - Direct

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as to the open claims against Manhattan Casualty
Company?

A Yes.

Q Would you give us that opinion, sir?

MR. ANNENBERG: Objection, your Honor.

THE REFEREE: Overruled. After all,
if we went into each one of these claims, we
would be here until the day of dawn, and I am
satisfied on the basis of the witness's back-
ground, the expertise, their experience, that
their answer, while to some degree conclusory,
must be accepted.

BY MR. SCHLOSSBERG:

Q Would you proceed?

A Yes. I feel after this inventory that these
reserves, in my opinion --

THE REFEREE: Excuse me. I want to
make one observation. When I say it is
accepted, subject, of course, to anything
that Mr. Annenberg can show to the contrary
here.

All right.

A (continuing) I feel that they are more than
adequate.

Peterman
for Liquidator - Direct

Q On what basis are you prepared to give your opinion, sir, that these reserves are more than adequate?

A We found ourselves with a unique situation, your Honor. We had all of these files fully investigated, aging, completely --

MR. ANNENBERG: Objection, your Honor.

This is pure hearsay.

THE REFEREE: Overruled. Go ahead.

A (continuing) And we were better equipped to make a more precise evaluation because everything was in the claim file, as opposed to the going concern where we were presented with a first report on Monday morning, and most of it is guesswork.

So we had a complete file, and I felt this was unusual, and we made our reserves with more precision.

THE REFEREE: All right.

MR. SCHLOSSBERG: I have no further questions, your Honor.

MR. ANNENBERG: So I may understand or guide my cross-examination, is this the only witness you are going to produce, Mr. Schlossberg?

MR. SCHLOSSBERG: No, I have another

Peterman
for Liquidator - direct

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witness I will be producing, but I don't know
in what area.

MR. ANNENBERG: On this subject of the
adequacy of the reserves?

MR. SCHLOSSBERG: I think basically,
Mr. Annenberg, Mr. Peterman is our principal
witness on the adequacy of the reserves.

EXAMINATION

BY MR. ANNENBERG:

Q Mr. Peterman, are you an attorney?

A No, sir.

Q Is Mr. Bonnell an attorney?

A No, sir.

Q Is Mr. Wilson an attorney?

A No, sir.

Q Isn't it a fact, sir, that many of the
issues involved in these claims concerned legal ques-
tions?

A Yes, sir.

Q And isn't it a fact that you are not
qualified to pass upon those legal questions?

A That is correct.

Q So that you set up your so-called reserves
on the basis of no consideration for the legal questions

Peterman

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involved; is that correct?

A Incorrect.

Q Are you qualified to pass upon the legal questions that were involved in these instances?

MR. SCHLOSSBERG: I object to that, your Honor.

THE REFEREE: Sustained.

You may ask the witness what resort he had to any legal information in passing on the adequacy of the evaluation made. In other words, are there any lawyers in your place, have you consulted with anybody in connection with any of the problems posed in these claims?

THE WITNESS: Yes. I'm sorry.

BY MR. ANHEIMER:

Q When cases involved legal considerations, did you consult with anybody?

A Yes, sir.

Q With whom did you consult?

A With Mr. Hannon.

Q Mr. Hannon?

A Chief trial counsel.

THE REFEREE: He is a lawyer?

THE WITNESS: Yes, sir.

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Q Was any research done?

A I would submit a written memorandum to Mr. Hannon on a question of law, and he would pencil in an answer.

Q You say you would submit the memorandum, is that correct, to Mr. Hannon?

A Of cases that I review, yes.

Q When you submitted that memorandum, was it you who determined what the legal issue was?

A Yes.

Q Did Mr. Hannon do anything more than to pencil in answers?

A No, sir.

Q Did he cite any cases to you?

A I can't recall.

Q In how many of those claims which you passed upon, did you ask Mr. Hannon to give you a legal opinion?

A I can't recall.

Q What is your best recollection?

A It would be a guess. I would say a dozen.

Q That is a dozen out of the total claims that were outstanding, as referred to in your chart here?

1 Peterman
2 for Liquidator- cross
3 A Of the inventory.

4 Q Did Mr. Bonnell evaluate legal situa-
5 tions that were involved?

6 A He would have to consider them.

7 Q Did he have to discuss them with you
8 before any memorandum was submitted to anyone?

9 A Yes. He spoke with me.

10 Q So that all memoranda came through
11 you; is that correct?

12 A Yes.

13 Q And then the total number of memoranda
14 submitted on behalf of Mr. Bonnell, Mr. Ryan, Mr.
15 Wilson and yourself was twelve; is that correct?

16 A Approximately.

17 Q Are you an accountant?

18 A No. sir.

19 Q When you made your evaluation, other
20 than this paper which is called "Summary of Inventory
21 Claims Reviewed," did you make any other papers, Mr.
22 Peterman?

23 A Yes, sir, I did.

24 Q What papers did you make?

25 A ^{PREPARED FOR}
~~I had presented to myself~~ a detailed summary
or detailed data, with data behind the summary, if I

1 Peterman

2 for Liquidator - cross
may put it that way. There was other figure work

3 I had to do.

4 Q Do you have that detailed summary as
5 part of your papers?

6 A No, sir.

7 Q Do you still have that detailed summary,
8 sir?

9 A Yes, I do.

10 MR. ANNENBERG: I ask that it be produced,
11 your Honor.

12 THE REFEREE: Do you have such a thing?

13 MR. SCHLOSSBERG: We don't have any-
14 thing with us here, your Honor.

15 As I understand it, this summary is the
16 basis of the testimony.

17 THE REFEREE: All right. I have ac-
18 cepted that, and I will overrule your applica-
19 tion.

20 Next question.

21 BY MR. ANNENBERG:

22 Q Were you asked to make the review that
23 you have just referred to?

24 A Yes, sir.

25 Q Who asked you to do it?

1 Peterman
for Liquidator - cross
2 A My superior, Mr. Dowling.

3 Q And did Mr. Dowling tell you that he
4 wanted you to do this for the purpose of showing
5 that there would be enough assets to pay the liabilities
6 if the case of the Superintendent of Insurance
7 against Bankers Life was settled?

8 A No, sir.

9 Q Did he tell you that you were to make
10 this summary for the particular purpose of today?

11 A Yes, sir.

12 Q When you were going over these figures,
13 you bore in mind the purpose of your investigation;
14 is that correct?

15 A Incorrect.

16 Q Pardon?

17 A Incorrect, sir.

18 Q Incorrect? Are you saying that you
19 didn't have that in mind?

20 A Not paramount in mind, no.

21 Q Pardon?

22 A It was not paramount in my mind.

23 Q What was paramount in your mind?

24 A The file before me as I reviewed it, unen-
25 cumbered, uninterested in hearings, I and my men,

1 Peterman
2 for Liquidator - cross
3 we reviewed these files as we saw them.

4 Q But you were doing it for your boss,
5 weren't you?

6 A Yes.

7 Q Didn't you bear in mind that if you did
8 not do the right job for your boss, you could be fired?

9 MR. SCHLOSSBERG: I object to that.

10 THE WITNESS: No, sir.

11 MR. SCHLOSSBERG: I object.

12 THE REFEREE: Sustained.

13 Q When you made these so-called reserves,
14 did you have a particular formula which you applied
15 in each case?

16 A No, sir.

17 Q Was the reserve based upon what you in
18 your own mind determined you should put?

19 A Yes. From my experience.

20 Q And that experience is based on not
21 more than two years in connection with Manhattan
22 Casualty Company; is that correct?

23 A I don't understand you, sir.

24 Q You have only been connected with Manhattan
25 Casualty Company for two years; is that correct?

A No, sir. I am with the Liquidator, I am with

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2 for Liquidator - cross
the Insurance Department two years.

3 Q Yes, with the Insurance Department?

4 A Yes.

5 Q In the Insurance Department, you have
6 other jobs to do; is that correct?

7 A Yes, sir.

8 Q How much time did you spend in making
9 the evaluation in setting up the reserves of all of
10 these cases?

11 A Well, it was the better part of six or eight
12 weeks.

13 Q Six or eight weeks?

14 A The team.

15 Q And how many hours per day on these
16 claims?

17 A Full time, a full day.

18 Q I see. And is that true of the entire
19 team?

20 A Yes, sir.

21 Q Can you tell me what the total of the 588
22 outstanding claims was?

23 A I would have to take pen in hand. I didn't show
24 it at the bottom.

25 Q Pardon?

1 Peterman
2 for Liquidator - cross
3 A The total?

4 Q I am asking what the total of the money
5 claimed in connection with the 588 suspended personal
6 injury-property damage unadjudicated claims was. What
7 was the total money amount that was claimed in con-
8 nection with the 588 claims?

9 A I don't have that with me.

10 MR. SCHLOSSBERG: I am going to object
11 to the question, in any event, on the ground
12 that what is at issue in this proceeding is
13 the adequacy of the moneys to pay the claims,
14 not the amount that has been claimed by policy-
15 holders of Manhattan Casualty.

16 I think that is totally irrelevant.

17 MR. ANNENBERG: That is very much in
18 issue, your Honor.

19 I am cross-examining him on his setting
20 up of the so-called reserves, and the total
21 claims that were made is very much at issue.

22 THE REFEREE: All right. I will sustain
23 the objection.

24 The Courts have uniformly advised juries
25 that the amount sought in an action has nothing
to do with the case.

BY MR. ANNENBERG:

Q What was the total amount claimed in connection with the suspended general liability on unadjudicated claims?

MR. SCHLOSSBERG: Objected to for the same reason, your Honor.

THE REFEREE: Sustained.

MR. ANNENBERG: And I would ask the same question concerning all of these.

THE REFEREE: The other four, and you would get the same ruling.

Q Under Item 5, "Claims Not Stated," did you liquidate those claims?

A No, sir.

Q Did you make any evaluation concerning the money amount of those claims?

A Yes, I did.

Q How did you do that?

A I did it on the basis of reinsurance. Knowing that Manhattan Casualty had a ^{RETENTION} ~~reserve~~ of \$10,000, I simply used that as a factor, 73 times 10,000.

Q I see. How much of that reserve did you allow for the 73 times 10,000?

A Well, without the file -- I would have to have

Peterman
for Liquidator - Cross

each individual file to answer that question, counsel-
or.

Q So you can't answer it without your
file?

A Without each file.

MR. ANNENBERG: I ask that those files
be produced. Your Honor, I can't cross-
examine this witness without having the neces-
sary papers here, and they have not produced
the necessary papers.

I would respectfully request that this
hearing be suspended and that they be directed
to produce these papers so that I can cross-
examine on them, and I would like to have
a direction that I be permitted to see all
of these papers.

THE REFEREE: I have already made the
prior observation that a proceeding of this
kind would be interminable.

I will accept this summary which has
been submitted, fortified by the testimony
of the witness, and I therefore deny your
motion.

Next question.

Peterman
for Liquidator - cross

BY MR. ANNENBERG:

Q How did you evaluate the 26 general liability claims of the "Claims Not Stated"?

A Again, I would consider the reinsurance factor. Not knowing the amounts, I would use \$10,000 as a multiplication factor, 26 times the company's retention of ten.

That, of course, was an outside figure because Manhattan Casualty did have a property damage retention for less, namely, 5,000.

Q Are you saying that for 26 times 10,000, which is \$260,000 of unstated claims, you -- how much did you allow for those, how much reserve did you allow for those \$260,000 of unstated claims?

A I would have to answer you on a per-case basis, counselor. I would have to have the file.

Q So you do not know?

A These are total reserves.

Q Now, as to the claims which you evaluate as to be disallowed, did you allow any reserve?

A On claims to be disallowed?

Q Yes.

A We did not allow for any reserves.

Q Not one penny?

Peterman
for Liquidator - Cross

A No, sir.

Q What are the "To Be Adjudicated" cases?

Are those cases which have not yet been passed up
by the Superintendent?

A Yes, sir.

Q Do any of those cases involve cases
which are now before the Courts?

A No, sir.

Q How many cases are before the Courts?

A I don't know.

Q Did you consider what cases were before
the Courts in making this document?

A Would you ask that again?

Q Did you give consideration to cases
that were before the Courts?

A In these classifications?

Q Yes.

A Yes.

Q In this evaluation?

A Yes.

Q Where is that in this document?

A The cases that we are talking about before
the Court are included in Column 3.

Q That is "To Be Adjudicated"?

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A for Liquidator - cross
 Yes, sir.

Q How many such cases are there under
each heading?

A Under Column 3, in the first caption, we have
"Suspended Personal Injury Property Damage Unad-
judicated," 223.

Q About how many of those are before the
Court?

A I don't know without the case file.

Q How many of those are there that have
not yet been passed upon at any time by the Super-
intendent of Insurance?

A I don't know.

Q Of each of these categories, what is
the total amount claimed by the claimant?

MR. SCHLOSSBERG: Again, objection,
your Honor. Just the same question through
a back door.

THE REFEREE: Yes. Sustained, yes.

Q And of the 105 claims under "Suspended
General Liability Unadjudicated" --

A Yes.

Q -- how many of those are before the
Courts?

for Liquidator - cross

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2 A I don't know.

3 Q How many have not yet been passed upon
4 by the Superintendent of Insurance?

5 A At any time?

6 Q Yes.

7 A I don't know.

8 Q Is your answer the same concerning all
9 of the cases in the column "To Be Adjudicated"?

10 A Yes, sir.

11 Q Now, on the "Stated Claims," how many
12 of those cases are before the Court?

13 A I don't know.

14 Q So that you don't know how many of
15 the stated claims under Column 4 are before the
16 Courts?

17 A No, sir.

18 Q On the claims to be disallowed, are
19 any of those cases before the Courts?

20 A No, sir.

21 Q Do you know that to be a fact?

22 A Yes, sir.

23 Q So those cases are the cases which the
24 Superintendent has not yet officially passed upon?

25 A That is correct.

Peterman

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for Liquidator - cross

Q Your recommendation is that he dis-
allow those claims in their entirety?

A Yes, sir.

Q Now, on the claims not stated, are any
of those before the Courts?

A I don't know. Not without the file.

Q Has any report been made to the Court
since the Seventh Comprehensive Report, so-called?

A I don't know.

Q Prior to making this schedule that
you just referred to, did you consult the Seventh
Comprehensive Report of the Superintendent of In-
surance?

A I don't think so.

Q Did you consult that report to ascertain
what the total amount of claims that was made in
that report was?

A Did I consult it?

Q Yes.

A No, sir.

Q Did you consult it for the purpose of
ascertaining what part of the claims that had been
disallowed by the Superintendent was ultimately
adjudicated as good claims by the Courts?

1 Peterman
for Liquidator - cross.

2 A No, sir.

3 Q Is it a fact, then, that in making your
4 exhibit here, that you consulted nothing except the
5 so-called files that you mentioned, nothing that
6 had gone on prior thereto in connection with the
7 liquidation of Manhattan Casualty?

8 A That is correct.

9 Q Was it your function only to set up so-
10 called reserves? Did you do anything else in de-
11 termining whether there were sufficient assets to pay
12 the liabilities?

13 A No, sir.

14 Q Yet you reached the conclusion that
15 there are sufficient assets to pay the liabilities;
16 is that correct?

17 MR. SCHLOSSBERG: Objection, your
18 Honor.

19 There is no such testimony to that
20 effect; none whatsoever. This man has given
21 no such opinion.

22 THE REFEREE: Sustained.

23 BY MR. ANNENBERG:

24 Q Were you asked to pass upon the other
25 assets of Manhattan Casualty Company?

Peternan

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A for Liquidator - cross
No, sir.

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Q And your sole function was to set up
the so-called reserves; is that correct?

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A That is correct.

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Q Am I correct when I conclude that the
reserves that you set up depended upon something that
you fixed in your mind without any scientific formula?

9

A By my experience.

10

Q Just your experience?

11

A That is correct.

12

Q No formula?

13

A No formula.

14

THE REFEREE: You say no formula. How
long have you been doing this work?

15

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THE WITNESS: Twenty-three years, your
Honor.

17

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THE REFEREE: Twenty-three. And in the
consideration of claims, you take into con-
sideration a lot of imponderables?

21

THE WITNESS: Yes, sir.

22

23

THE REFEREE: So wouldn't that be a
formula?

24

25

THE WITNESS: I call it my -- actually,
yes, this is the formula.

Peterman
for Liquidator - Cross

BY MR. ANNENBERG:

Q What imponderables --

MR. ANNENBERG: Excuse me, your Honor.

THE REFEREE: The imponderables that
he had in mind or that I had in mind?

Q (continuing) What imponderables did
you have in mind?

A Well, you can research a claim file, finish
your study, and then recognize the attorney for the
plaintiff, and right away that would demand a little
more respect in some cases and less in others.

And I find that it is important to know the
jurisdiction, your Honor, the Supreme Court and the
Civil Court.

Q Does it make a difference from the point
of view of Court determination?

THE REFEREE: Of what?

MR. ANNENBERG: Of Court determination.

THE REFEREE: What does that mean?

Q Does it make a difference from the point
of view of what the Court will decide?

A I think of the jury rather than the Court.

I beg your pardon.

Q Of the jury?

Peterman
for Liquidator - Cross

1 THE REFEREE: I think that now we are
2 going too far afield on that point. All I
3 had in mind, when he stated that he had no
4 formula, I thought that perhaps I should get
5 into the record, based on his experience,
6 that there must have been some type of formula
7 that he arrived at, even though it is all summed
8 up in the word that I used, "imponderables."
9 Maybe it wasn't the best word.
10

11 Let me ask you this question: You say
12 you have been in the business twenty-three
13 years; is that right?

14 THE WITNESS: That is right.

15 THE REFEREE: You said you were not a
16 lawyer?

17 THE WITNESS: Yes, sir.

18 THE REFEREE: And that you consulted
19 with other people who were not lawyers, who
20 were doing that type of work?

21 THE WITNESS: In this review?

22 THE REFEREE: Yes. And also that when
23 some claim posed some special question of
24 liability which required, in your opinion, the
25 decision of a lawyer, you did apply to Mr.

Peterman
for Liquidator - Cross
Hannon?

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THE WITNESS: By memo, yes.

THE REFEREE: Is that a practice that
is employed generally in insurance companies
by claim agents in that type of practice that
you have?

THE WITNESS: My experience as I may --
as a desk man, as a claims man?

THE REFEREE: Yes.

THE WITNESS: Whenever a question of law
presented itself in a file, outside of my general
familiarity with the law, I would prepare a
memo for our Legal Department.

THE REFEREE: I really didn't mean that.
I meant on the basis of your experience in the
handling of these claims and the way they are
handled by claims agents for other insurance
companies.

THE WITNESS: I'm sorry. Yes.

THE REFEREE: Are these claims agents of
other insurance companies all lawyers?

THE WITNESS: I don't know, Judge.

THE REFEREE: Do you know any other
claims agents of any other companies?

Peterman
for Liquidator - cross
THE WITNESS: Yes, I do.

THE REFEREE: Are they all lawyers?

THE WITNESS: No, sir, they are not.

THE REFEREE: That is the point I am
asking you.

THE WITNESS: The word "agents" threw me.
Adjusters.

THE REFEREE: It was almost gratuitous
for me to say this.

In my long experience at the bar and as
a prolific trier of cases, in the settling of
cases, the lawyer frequently would bring down
the man who wasn't a lawyer, who was the claims
man and who was the fellow who was the expert
and who determined even over the lawyer how
much the case was worth.

THE WITNESS: I beg your pardon. Agent
connotes underwriting, broker.

THE REFEREE: What do you say about the
observation I just made? Is that correct?

THE WITNESS: Yes. There are laymen
in the Casualty Claims Department and there
are attorneys.

THE REFEREE: But do laymen Pass on these

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2 for Liquidator - cross
claims?

3 THE WITNESS: Yes sir.

4 THE REFEREE: And is that a common
5 practice in all insurance companies?

6 THE WITNESS: Yes, it is.

7 THE REFEREE: I just wanted to get into
8 the record the question as to whether or not
9 you were not amiss in failing to apply for
10 legal assistance in every claim.

11 All right. Next question.

12 BY MR. ANNENBERG:

13 Q Mr. Peterman, you talked about your ex-
14 perience in the past nineteen years --

15 THE REFEREE: Twenty-three years, he
16 said.

17 Q (continuing) All right. Will you
18 tell us what kinds of claims you had experience in?

19 A Well, my experience has been in every kind
20 of casualty claim other than fire and other than
21 workmen's comp.

22 Q Did you have experience in disability?

23 A No experience in disability.

24 Q Isn't it a fact that your experience
25 was limited to personal injury and property damage

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cases?

A Personal injury and property damage cases?

Q Yes.

A General liability category and also --

Q Tell me what you mean by general liability category?

A General liability takes in the whole field of insurance relating to real property, owner, landlord and tenant policies, false arrest, elevator cases.

Q How many false arrest cases were there that you had to pass upon?

A If I may guess, I would say none.

Q How many matters involving real estate were you called upon to pass upon?

A Well, I don't know, without the work sheets. General liability?

Q Yes.

A 144 outstanding claims. It is in there.

Q Will you categorize the claims that you were called upon to pass upon here?

A I would say 143.

Q Yes, and tell us the types. You said they were general liability. Tell us the types. One type, you said, was false arrest, but you were not called

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upon to pass ^{for liquidator - Cross} upon that.

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Tell us what you were called upon to pass upon.

5

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A There would be garage keeper's legal liability, owner landlord and tenant.

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Q Owner landlord and tenant; how many such cases were you called upon to set up reserves for in your 23 years of experience prior to Manhattan Casualty Company?

11

12

13

A I don't know.

Q Pardon?

A I don't know.

14

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Q Is it not a fact that there were none?

A I don't follow your question. I have looked at thousands of cases in my experience, thousands.

17

18

Q Have you been called upon to set up reserves for them?

19

A Oh, yes.

20

21

22

Q Is there any difference between setting up reserves for this kind of case and setting up reserves for personal injury and property damage cases?

23

A No difference.

24

25

Q Tell me how many commercial risk policies you have passed upon in your 23 years of experience.

1
2 A for Liquidator - cross
Thousands.

3 Q Thousands? How many thousands?

4 A I don't know.

5 Q How many homeowners' policies?

6 A A great many.

7 Q But you can't tell us how many?

8 A No, sir.

9 Q How many personal injury and property
10 damage cases were you called upon to pass upon in
11 your 23 years of experience?

12 A The frequency of auto cases are more than the
13 general liability.

14 I would say three to one on the general lia-
15 bility.

16 Q What is the percentage of reserve which
17 you deem to be a fair reserve in a personal injury-
18 property damage case?

19 MR. SCHLOSSBERG: I am going to object
20 to that.

21 THE REFEREE: Sustained.

22 Q In considering the amount of reserve, do
23 you consider first the total claim that is made?

24 A Yes.

25 Q Is it essential that you have to consider

Peterman
for Liquidator - cross
the total claim that is made?

A Certainly.

Q And isn't the reserve dependent, to some extent, upon the total claim that is made?

A I look at the total claim that is made in relation to coverage.

My primary responsibility in a going company was coverage. Without a contract that covers the loss, well, then, we are talking about nothing. So the amount that is claimed for is important to me in relation to coverage.

Q You say the question of who the attorney was is of concern to you in setting up a reserve; is that correct?

A In certain cases, yes.

Q What else would you consider?

A Social status of the claimants, passenger as against driver, infant as against adult.

Q What else?

A Male, female. Cosmetic problems enter into it on female cases.

Q Did you pass upon the case involving Harry Berg?

A No.

Peternan

for Liquidator - cross

Q Do you know who did that?

A I don't know.

Q Do you know in what category that claim came?

A I don't.

Q Did somebody pass upon that claim?

A I am not familiar with the claim, counselor.

Q Pardon?

A I am not familiar with the claim.

Q I see. Isn't it a fact that all claims had to come to you?

A No, sir.

Q Didn't you say that you were the supervisor of the team, and that before any reserve was made the matter had to be discussed with you?

A No, I didn't say that.

Q Did each one of these individuals set up his own reserve?

A Yes, sir.

Q And did you accept it?

A Yes, I did.

Q And you never heard of the case of Harry Berg?

A No, sir.

Peterman
for Liquidator - cross

Q Can you tell me what the amount of
reserve is for the claim of Harry Berg?

MR. SCHLOSSBERG: I object. The ques-
tion has been asked and answered.

THE REFEREE: Sustained.

MR. ANNENBERG: I ask that any papers
or documents be produced concerning whether
an evaluation was made of the claim of Harry
Berg and whether any reserve was set up.

MR. SCHLOSSBERG: If your Honor please,
our next witness will be in a position to
answer that question.

THE REFEREE: All right. Have you
any more questions?

BY MR. ANNENBERG:

Q When you passed upon these claims, did
you study the whole file?

A Yes, sir.

MR. ANNENBERG: Your Honor, I have many
more questions, but what I would like to do
is to see whether I should pass them to the
next witness or whether I should recall Mr.
Peterman, in the interest of saving time now.

THE REFEREE: All right. Suppose

Peterman
for liquidator - cross
we call the other witness.

We will call you back if he wants to
ask you something else.

All right, the next witness. Who is that?

MR. SCHLOSSBERG: Mr. Minches, your
Honor.

(Witness excused.)

oOo

1 LEONARD H. MINCHES, FOR LIQUIDATOR, DIRECT

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2 L E O N A R D H. M I N C H E S, residing
3 at 23 Bulaire Road, East Rockaway, New York,
4 having been first duly sworn by the Referee,
5 was examined and testified as follows:

6 EXAMINATION

7 BY MR. SCHLOSSBERG:

8 Q Would you state your full name for the
9 record?

10 A Leonard H. Minches.

11 Q Mr. Minches, what is your occupation?

12 A I am an attorney with the New York State
13 Insurance Department, Liquidation Bureau. I am
14 also the Assistant Special Deputy Superintendent
15 Attorney for the Liquidator and Claims Supervisor
16 of the Liquidation Bureau.

17 Q Mr. Minches, as part of your duties
18 in the Liquidator's Office, you are familiar, are
19 you not, with the affairs of the Manhattan Casualty
20 Company?

21 A Yes, I am.

22 Q Will you tell us how long you have been
23 working on various matters relating to the affairs of
24 Manhattan Casualty Company, Mr. Minches?

25 A I was with Manhattan Casualty Company before

1
2 fer Liquidator - direct
3 it went into liquidation, since 1958, I believe, and
4 I have been with the Liquidation Bureau since it
5 went into liquidation, except for a period of about
6 one year in 1965.

7 Q Mr. Minches, you have heard the testimony
8 of Mr. Peterman, and have you also seen the document
9 which he has been testifying from, the summary of
10 inventory of claims?

11 A Yes, I have.

12 Q Did you see that summary before it was
13 introduced at this hearing today?

14 A Yes, I did.

15 Q And you are familiar with the preparation
16 of this summary and the matters which were reviewed
17 and reflected thereon?

18 A Yes, I am familiar with it.

19 Q Now, directing your attention to the
20 claim of one Harry Berg, are you familiar with that
21 claim, sir?

22 A Yes, I am.

23 Q Can you tell us, sir, whether or not a
24 reserve has been established in the case of Harry Berg?

25 A A reserve has been established for that case.

 Q Would you tell us at this time the

Minches
for liquidator - direct

reserve that has been set up for that case?

A \$80,000.

Q Is that reserve reflected on this summary sheet, Mr. Minches?

A Yes, it is included in the last category, "All Others Deferred and Suspended."

Q So that is within the \$131,038.88 figure; is that correct?

A That is correct.

Q I show you now, Mr. Minches, a document which has been previously deemed marked in evidence, and which is entitled "Manhattan Casualty Company in Liquidation, Statement of Additional Funds Required to Pay all Claims as at December 31, 1972."

Are you familiar with that document,

sir?

A Yes, I am.

Q You have seen that document before today?

A Yes.

Q You are familiar with its preparation?

A Yes, sir.

Q Mr. Minches, would you tell us, please, based on the document now before you, the amount of

1 Minches
2 for Liquidator - direct
3 moneys required to pay all claims against Manhattan
4 Casualty as at December 31, 1972?

5 MR. ANNENBERG: Your Honor, is it
6 understood that I have an objection?

7 THE REFEREE: Yes.

8 MR. ANNENBERG: As to all testimony.

9 THE REFEREE: Yes.

10 A This figure is \$768,294.

11 Q In arriving at that figure, was a re-
12 serve set aside for claims not yet adjudicated or
13 open claims of Manhattan Casualty Company?

14 A Yes.

15 Q What figure was referred to on this sum-
16 mary sheet?

17 A \$1,500,000.

18 Q Then, as I understand your testimony, in
19 this summary sheet, if a reserve of \$1,500,000 was neces-
20 sary to pay all open claims, the Liquidator's Office
21 would still require some \$768,000 to satisfy all
22 claims; is that correct?

23 A That is correct.

24 Q Again, referring to the testimony of
25 Mr. Peterman, he has testified that the total amount
of reserves on all open claims is \$943,000. You

1
2 have heard that testimony?

3 A Yes, I have.

4 Q And was Mr. Peterman's summary completed
5 subsequent to the time that the document now before you
6 was prepared?

7 A Yes, it was.

8 Q Referring to the two documents in Mr. Peterman's
9 testimony, is there an additional fund available to satisfy
10 the outstanding claims of Manhattan beyond what is reflected
11 on those documents?

12 A Yes. There is a difference of close to \$600,000
13 from the December 31, 1972 summary, the projection of
14 reserves as opposed to what Mr. Peterman, under his super-
15 vision, what they determined would be the actual reserves
16 required.

17 Q If we were to accept at this point Mr. Peterman's
18 determination, and when I say Mr. Peterman I mean Mr. Peterman
19 and his team, their determination as to the reserves necessary
20 to satisfy the outstanding claims, on that basis how much
21 money would be required now to satisfy all of the outstanding
22 claims against Manhattan?

23 MR. ANNENBERG: Objection, Your Honor.

24 THE REFEREE: Overruled.

25 A Probably not more than \$200,000.

Minches
for Liquidator - direct

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2 Q Now, Mr. Minches, in your capacity as attorney
3 within the Liquidator's Office, did you cause an investiga-
4 tion to be made into the assets and ability to satisfy a
5 judgment if one were to be rendered against the individual
6 defendants named in the present lawsuit?

7 A Yes, I did.

8 Q And for the record, were those individuals
9 named in the pending action George K. Garvin, James. F.
10 Begole, John F. Sweeny and Standish T. Bourne?

11 A Those are the four individuals.

12 THE REFEREE: Yes, I know.

13 Q First directing your attention to Standish T.
14 Bourne, would you tell us what investigation you made to
15 determine what assets Mr. Bourne had?

16 A We had known that Mr. Bourne was deceased and he had
17 died in Massachusetts, we retained an attorney in Massachu-
18 setts to investigate the probate records or whatever records
19 were available regarding Mr. Bourne's estate.

20 Q And I show you a letter dated March 20, 1973
21 addressed to you and I ask you if that is the response
22 you received in connection with your request for information
23 concerning the value of the Estate of Standish T. Bourne?

24 A Yes. That is the response.

25 MR. SCHLOSSBERG: Your Honor, I have a copy of

1 Minches
2 for Liquidator - direct
3 this document and we request that the document be
4 deemed marked in evidence.

5 MR. ANNENBERG: Objection.

6 MR. SCHLOSSBERG: May the record reflect that I
7 am furnishing a copy of this document to Mr. Annenberg.

8 MR. ANNENBERG: Objection.

9 THE REFEREE: Overruled. I will receive it.
10 It is deemed marked.

11 MR. SCHLOSSBERG: The document does speak for
12 itself, Your Honor, and so I will not burden the record
13 unless Your Honor wants me to.

14 THE REFEREE: It is a letter from Messrs.
15 Shagory and Shagory, Counselors at Law, 92 State
16 Street, Boston, Mass., dated March 20, 1973 addressed
17 to Leonard Minches, Esq., Manhattan Casualty Company
18 in liquidation. It consists of two pages.

19 Q Did you also cause an investigation to be made
20 into the state of affairs of the estate of one George K.
21 Garvin?

22 A Yes, I did.

23 Q And will you tell us what was the nature of that
24 investigation?

25 A We requested, we learned that Mr. Garvin died in
Florida, the State of Florida, and we requested the attorney

1 for Liquidator - direct
2 who handled that estate, who represented the executrix of
3 ESTATE
4 that estate, to furnish us with a letter concerning the
5 assets of that estate.

6 Q And as a result of your request for information,
7 did you receive a response from the law firm of Warwick,
8 Paul, Campbell & Shadady?

9 A Yes, I did.

10 Q And I show you this document and I ask you is
11 that is the response that you received from them?

12 A It is the response.

13 THE REFEREE: When is the letter dated?

14 THE WITNESS: March 23, 1973.

15 THE REFEREE: Is it addressed to you?

16 THE WITNESS: It is.

17 MR. SCHLOSSBERG: Your Honor, at this time I would
18 ask: there be deemed in evidence the letter dated
19 March 23, 1973, on the letterhead of Warwick, Paul,
20 Campbell & Shadady addressed to Leonard Minches at the
21 Liquidation Bureau to which is attached a two-page
22 document entitled "Petition for Probate of Will Number
23 32068 in re: Estate of George K. Garvin."

24 THE REFEREE: It may be received. Mr. Annenberg
25 has an exception.

 MR. SCHLOSSBERG: May the record reflect that I

for Liquidator - direct

1 am making available to Mr. Annenberg a copy of the
2 letter and the attachment which has just been identified.

3 Q Mr. Minches, again as part of your duties as an
4 attorney with the Liquidator's Office in connection with
5 the affairs of Manhattan Casualty, did you cause an investi-
6 gation to be made concerning the affairs of the Estate of
7 James F. Begole?
8

9 A Yes.

10 Q And in connection with this investigation
11 would you tell us what information you obtained?

12 A Mr. Begole had ^{FILED}~~noticed~~ a claim in the liquidation
13 proceeding for some back salary for expenses, I can't
14 recall which it was but one or two claims filed by Mr.
15 Begole and, as a result of those claims being filed, the
16 Internal Revenue Service filed with the Liquidator a notice
17 of levy on those claims and about a year ago one of the
18 agents from the Internal Revenue Service was in our office
19 and I had a conversation with him concerning the Begole
20 Estate because he had questioned us, what was the disposition
21 of the claims filed in the proceeding.

22 Q And will you tell us what this agent advised you
23 at that time?

24 A He told me that his investigation of Mr. Begole's
25 estate revealed that there were no tangible assets other

1
2 for Liquidator - direct
than a home which Mrs. Begole was living in upstate New York.

3 There were no money assets.

4 MR. ANNEBERG: Same objection, Your Honor,
5 to all of this testimony.

6 THE REFERENCE: Yes.

7 Q And I show you this document, Mr. Minches,
8 and I ask you if you have seen that before?

9 A Yes, I have.

10 Q And will you tell us what that is and how it
11 came to your possession?

12 A This is the notice of levy filed by the Internal
13 Revenue Service as against the claims I just mentioned in
14 the total amount of \$7,304,167.

15 Q This document comes from the files of the
16 Liquidator's Office, does it not?

17 A That is correct.

18 MR. SCHLESINGER: Your Honor, at this time I
19 would ask that be deemed marked in evidence copy of
20 a notice of levy, U.S. Treasury Department, Internal
21 Revenue Service, dated May 1, 1972, addressed to the
22 State of New York, Department of Insurance, the
23 name and address of the taxpayer is identified as
24 James F. (deceased) and Patricia C. R. Begale. May
25 the record also reflect I am making a copy of it

for Liquidator - direct
available to Mr. Annenberg.

Q Mr. Minches, as part of your investigation concerning the individual named in the complaint brought by the Superintendent involving Manhattan Casualty, did you cause to be made an investigation by Retail Credit Company service, reports concerning one John F. Sweeny?

A Yes, I did.

Q And did you receive a report from this company concerning Mr. Sweeny's present assets and net worth?

A Yes, I did.

Q I show you this document, sir, and I ask you if this is the document received from the Retail Credit Company?

A It is.

MR. SCHLOSSBERG: Your Honor, at this time I would ask that there be deemed marked in evidence a two-page document or the letterhead of Retail Credit Company entitled "Special Service Character Financial Report dated March 26, 1973 concerning John F. Sweeny." And may the record reflect that I am making a copy of this report available to Mr. Annenberg.

THE REFEREE: I might say to Mr. Annenberg with reference to any of those documents that have been

Minches
for Liquidator - direct

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received that if there is any question as to their
authenticity that he make such representation to me
in connection with any papers that are filed with me.

MR. ANNENBERG: You mean apart from the hearsay
nature of it, Your Honor?

THE REFEREE: Yes.

MR. SCHLOSSBERG: I have no further questions,
Your Honor.

EXAMINATION BY MR. ANNENBERG:

Q Mr. Minches, did you cause an investigation to
be made of the ability of Irving Trust Company to pay any
judgment?

A No, sir.

Q Did you cause an investigation to be made of
the ability of Bankers Life and Casualty Company --

A No, sir.

Q -- to pay a judgment?

A No.

Q Isn't it because you know that they are
responsible for any judgment that could conceivably be
obtained in this case?

MR. SCHLOSSBERG: Objection.

THE REFEREE: Sustained as being irrelevant.

All right.

1 Minches

for Liquidator - cross

2 Q Did you cause an investigation to be made of
3 the European American Banking Corporation?

4 A No, sir.

5 Q Did you cause an investigation to be made of the
6 European American Bank & Trust Company?

7 A No, sir.

8 Q Did you cause an investigation of Garvin Bantel
9 Corporation to be made?

10 A No, sir.

11 Q And each of those corporations is a defendant
12 in this action, is that correct?

13 A Yes.

14 Q Is the Harry Berg claim included in "all others
15 deferred and suspended" on the chart?

16 A Yes, it is.

17 Q And there were a total number of 196 claims,
18 is that correct?

19 A That is correct, sir.

20 Q And of the total reserve of \$131,000, 80,000
21 was allocated to Mr. Berg.

22 A That is right.

23 Q That is the full amount of his claim?

24 A That is right.

25 Q And is that the only claim as to which you

1
2 for Liquidator - cross
2 allowed the full amount of the claim?

3 A No, sir.

4 Q Pardon?

5 A I said no.

6 Q In how many of the claims in that category
7 have you allowed the full amount?

8 A Almost all of them.

9 Q Is it a fact then that the 196 of the claims
10 and all others deferred comprise a total of \$131,000?

11 A Yes. That is the figure.

12 Q Pardon?

13 A Yes.

14 Q And what papers did you check? On what papers
15 do you base your testimony?

16 A The claims filed in the liquidation proceeding.

17 As Mr. Peterman testified, these were miscellaneous
18 situations, outstanding checks at the time of the liquidation,
19 in small amounts, service and material claims, in small
20 amounts, several small fire claims, small burglary claims,
21 one or two other categories I can't think of, and in all
22 those cases, because of the small amounts that were involved
23 and the small number of the cases in each category, we made
24 a determination to ^{RESERVE} ~~allow~~ almost all of those claims in the
25 full amount of the claim allowed, claim stated.

1 for Liquidator - cross
2 Q You say almost all of them or all of them?

3 I can't say with absolute certainty every one but
4 most of them were, in most miscellaneous categories.

5 MR. ANNENBERG: I ask that the papers reflecting
6 the claims in question be produced, Your Honor.

7 THE REFEREE: The testimony is to the effect,
8 he said that all the claims in all of those 196
9 claims, the total amount sought was the amount which
10 was reserved.

11 THE WITNESS: In almost every one, Your Honor.

12 THE REFEREE: In almost every one. And he
13 also explained to us that \$80,000 represented the
14 Berg claim and some \$50,000, the difference, repre-
15 sented all the miscellaneous small claims, is that
16 correct?

17 THE WITNESS: That is substantially correct,
18 Your Honor.

19 THE REFEREE: All right. I think it is
20 unnecessary for us to detain ourselves with further
21 consideration of that small item and I will deny the
22 motion, whatever it is.

23 Q Was that same practice used in connection with
24 other claims?

25 A No, sir.

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for Liquidator - cross

Q Mr. Minches, who prepared this document which is called "Statement of Additional Funds Required to Pay all Claims as of December 31, 1972"?

A I assume it is our Controller's Department.

Q You don't know?

A I am sure it was our Controller's Department.

Q Did you see this document being prepared?

A Actually being typed?

Q No, being prepared. The figures obtained.

A No.

Q From what source were the figures obtained, if you know?

A From all the records in the liquidation proceeding of this company that were available, that we needed to prepare this.

Q Do you personally have knowledge concerning the records which were consulted?

A Only insofar as the reserves for claims.

Q But nothing else, is that correct?

A Not specifically, no.

Q You don't know the name of the individual who prepared this document?

A Yes, I do know.

Q What was his name?

- 1 Minches
2 A for Liquidator - cross
He was the supervisor of the preparation.
3 Q What was his name?
4 A Herbert Cohen.
5 Q And what is his job?
6 A He is the controller of the Liquidation Bureau.
7 Q And just what is his function?
8 A He handles all the financial situations regarding the
9 Liquidation Bureau.
10 Q Is he in charge of the books and records of
11 the Manhattan Casualty?
12 A Those relating to finances, yes.
13 Q Is he in charge of the entry making in the
14 books and records?
15 A I would say so.
16 Q Do you know?
17 A As controller, he is in charge of all the financial
18 records of the Bureau.
19 Q Who actually makes the entries in the books and
20 records of Manhattan Casualty?
21 A There are many employees in the Controller's Department.
22 Q Do you know who actually makes the entries?
23 A No, I don't.
24 Q So you don't know whether Mr. Cohen has anything
25 to do with the making of those entries, do you?

Minches

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-for Liquidator - cross-

1
2 A He is the supervisor of that department.

3 Q Have you ever seen him make any entries in the
4 books and records?

5 A On occasion, yes.

6 Q When?

7 A I don't know.

8 Q Do you know what he did in preparation for this?

9 A No.

10 Q There is an item here of securities. Market
11 value December 31, 1972. Will you give us a list of those
12 securities?

13 A I don't have a list of those securities.

14 Q Did you ever consult a list of those securities?

15 A Personally, no.

16 Q What is the value of those securities as of
17 March 31?

18 A I have no idea.

19 Q Were those securities taken in at the cost basis?

20 A I have no idea.

21 Q Who purchased those securities?

22 A I don't know.

23 Q When were they purchased?

24 A I don't know.

25 Q Was any consideration here given to whether any

1 Minches
for Liquidator - cross

2 commission would have to be paid when those securities
3 were sold?

4 A I don't know.

5 Q Was any consideration given to whether any
6 tax would have to be paid when those securities were sold?

7 A I don't know.

8 Q Mr. Minches, when will the liquidation of
9 Manhattan Casualty be completed?

10 A I can't answer that.

11 Q Will it be within a week?

12 A No, sir.

13 Q Will it be within a month?

14 A No, sir.

15 Q Will it be within a year?

16 A No, sir.

17 Q Will it be within two years?

18 A It is entirely possible that many steps could be taken
19 in the two years to come close to completing the liquidation.

20 Q Isn't it possible that these securities will,
21 within two years, have a much lesser value than as of
22 December 31, 1972?

23 MR. SCHLOSSBERG: Objection.

24 THE REFEREE: Sustained.

25 Q Did you give any consideration as to what value

1 Minches
2 for Liquidator - cross
3 the securities would have when the monies have been
4 distributed to the creditors?

4 THE REFEREE: That is the same question.

5 Objection sustained.

6 Q Now, "Reinsurance Recoverable". Will any
7 expenses be entailed in recovering this \$6,000?

8 A I don't believe so, no.

9 Q What is reinsurance recoverable?

10 A It means due to the Liquidator from reinsurance
11 companies on the basis of claims against the Liquidator,
12 Manhattan Casualty retention was fixed at a certain amount.

13 Q Have the reinsurance companies been paying all
14 claims of Manhattan Casualty voluntarily?

15 A They have been paying the claims.

16 Q Now there is an item here for preferred claims,
17 \$406,000. What period did those preferred claims cover?

18 A I don't know.

19 Q There is an item here, "Allowed General Claims".
20 What period does that cover?

21 A Covers up to the period of December 31, 1972.

22 Q Is that for the entire period of the liquidation
23 beginning when the Superintendent of Insurance took over?

24 A That is right.

25 Q And the "Reserved General Claims". What period

1 for Liquidator - cross
2 does that cover?

3 A It also covers the period from the time of liquidation
4 to December 31, 1972.

5 Q What is meant by "allowed" and reserved?"

6 A Those are the amounts, the total figure represents
7 the amounts that have already been allowed and paid either
8 in full or by way of dividends and reserves that were set
9 up on claims that were unadjudicated up until this time.

10 Q What was the amount of that reserve?

11 THE REFEREE: The total on Page 2 is the same
12 as the allowed and reserved, namely \$6,655, 240.

13 Q That is the figure there. I am trying to find
14 out what it is, whether he knows what it is and apparently
15 he doesn't. He is the one testifying.

16 A The reserve on the claims in suit, not reserved is
17 \$300,000 on Page 2 of this report, Page 2.

18 Q Mr. Minches, you stated that allowed includes
19 the payments paid to date, is that correct?

20 A That is right.

21 Q It says here, "Paid to date \$732,000".

22 A It says "Less paid to date".

23 Q Yes.

24 A I can't answer that question without referring to
25 Page 2, Mr. Annenberg, which is a breakdown.

1 Minches""
2 for Liquidator - cross
3 Q Refer to Page 2.

4 A This is broken down into several categories, under
5 "General Claims".

6 Q Yes. Now, tell us, the general claims, New
7 York State, \$3,892,000. Where did you get that figure?

8 A That is the actual figure that was paid under Section
9 333 to satisfy claims in the liquidation proceeding less
10 the contributions paid by Manhattan Casualty Company to
11 that security fund when it was a going company.

12 Q So that the claims have already been paid, is
13 that correct?

14 A That is right.

15 Q The "Suspended Claims", is that the total of
16 the suspended claims, the total amount of the suspended
17 claims?

18 A That was the reserve that was set up.

19 Q Is it the total of the claims made?

20 A No, it is not.

21 Q What is the total of the claims that were
22 made?

23 A I have no idea.

24 Q Now, "Additional Reserve on Claims in Suit not
25 Reserved". What is that?

26 A Those are claims other than the suspended claims in

Minches
for Liquidator - cross

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2 Section 330 and 333 which would include general liability
3 claims and all other claims not covered by Section 330 or
4 333.

5 Q What is the total of those claims?

6 A The reserve was \$200,000.

7 Q I asked you what is the total of the claims in
8 suit.

9 A I have no idea what the total amount was claimed.

10 Q There is a reserve here for disallowed claims
11 before Referee. What is that?

12 A Those were claims that were recommended for disallowance
13 that were pending before a Referee in the liquidation
14 proceeding.

15 Q Still undetermined?

16 A That is right, about 15 of them.

17 Q What is the total amount claimed in those claims?

18 A I have no idea.

19 Q Give us a breakdown of the estimated future
20 expenses as set forth on the first page.

21 A What do you mean by breakdown?

22 Q Will you tell us what that comprises?

23 A It would comprise salaries paid to employees.

24 Q How much?

25 A Let me finish my answer.

1
2 Q Excuse me.
3

4 A Salaries paid to employees of the Liquidation Bureau
5 that would be allocated to the Manhattan Casualty
6 liquidation on the basis of the time sheets submitted.

7 Q How much is that?

8 A I have no idea. This is estimated future expenses.

9 Q Who made the estimates?

10 A I don't know the exact name of the person, several
11 people were consulted.

12 Q And you don't know what the estimates were based
13 on?

14 A Yes. Based on the expenses, based on the past
15 experience concerning the work done on Manhattan Casualty
16 and they were estimated as to how long it would take to
17 complete the liquidation and the records that we used
18 formed the basis of this estimate.

19 Q Do you know that of your own knowledge?

20 A Yes, I do.

21 Q Did you see the computations?

22 A No, I didn't see the computations.

23 Q Were any computations made that you saw?

24 A No.

25 Q So you can't tell us --

MR. SCHLOSSBERG: I am going to object to that

1 Minches
2 for Liquidator - cross
3 last question because it has two parts to it. And
4 the answer won't come out properly. Break it up into
5 two questions, if you want, Mr. Annenberg. I ask the
6 answer be stricken so there can be no conclusion on
7 the record.

8 THE REFEREE: Yes. That may be stricken.

9 Q How many employees are involved in the Manhattan
10 Casualty liquidation?

11 A That depends on the work being done in the liquidation
12 proceeding concerning Manhattan. It varies from time to
13 time in the Bureau.

14 Q What does it vary between?

15 A Approximately 90 odd employees in the Bureau, I would
16 say, on peak periods working with Manhattan Casualty at the
17 early part of the liquidation, there may have been 45 or 50
18 people working at various times during their workday or
19 week working on this particular liquidation. As the
20 liquidation progressed and the work on Manhattan became
21 less and more on other companies --

22 THE REFEREE: You would release them?

23 THE WITNESS: Yes. Release them for work on
24 other liquidation proceedings and other matters in the
25 office.

26 Q How much time was estimated that they would have

1 Minches 179
2 for Liquidator - cross
3 to spend in connection with the work that has to be done
4 in MCC?

5 THE REFEREE: If you object to that, I will
6 sustain the objection.

7 MR. SCHLOSSEBERG: Your Honor, I do so.

8 THE REFEREE: Sustained.

9 Q Did you give any consideration to the amount
10 of time which would be required to be used by employees
11 of MCC in the future? Any employees of the liquidation
12 in connection with MCC in the future.

13 A Of course.

14 Q Pardon?

15 A Of course.

16 Q How did you make that calculation?

17 A The various departments that would be involved in
18 winding up the liquidation were consulted as to the
19 approximate time it would take to do one job or another.
20 There were many different facets of the liquidation that
21 would have to be closed in order for this proceeding to be
22 closed. To give you an exact time how much individual A
23 works and individual B is impossible.

24 Q How much of this \$275,000 was attorneys' fees?

25 A Attorneys' fees?

Q Yes, if any.

Minches
for Liquidator - Cross

2 A I don't know.

3 Q Did you include attorneys' fees in there?

4 A All future expenses in the liquidation were included.

5 Q Will you tell us what those expenses were?

6 Break them down for me, please.

7 A I already mentioned the salaries of employees allocated
8 to Manhattan Casualty.

9 Q What else?

10 A All expenses with regard to the completion of the
11 liquidation proceeding.

12 Q Tell us what those expenses are.

13 THE REFEREE: I think they are still uncertain
14 and I will sustain an objection.

15 MR. SCHLOSSBERG: One problem we have here is
16 that Mr. Minches has testified that he did not prepare
17 this document. Mr. Annenberg is questioning him as
18 though it was actually his work product.

19 THE REFEREE: Mr. Minches, the controller, in
20 connection with the preparation of this report, which
21 is deemed in evidence, described assets and liabilities
22 as of December 31, 1972, with the annexed paper which
23 represents the breakdown of one of the items on the
24 front page, taking from appropriate sources the details
25 or items in order to make this report, is that right?

for Liquidator - cross

MR. ANNENBERG: I object, Your Honor.

THE WITNESS: That is right.

MR. ANNENBERG: This is pure speculation.

THE REFEREE: Is that contained in itemized records in your office?

MR. ANNENBERG: Objection, Your Honor.

THE WITNESS: I don't believe that they would be itemized as you may indicate, Judge. Some of those matters, of course, the actual cash and source, of course, are itemized fixed amounts.

THE REFEREE: So this paper deemed an exhibit was taken from documents that you have and you keep in the regular course of your business?

MR. ANNENBERG: Objection, Your Honor.

THE WITNESS: That is right.

THE REFEREE: Next question.

Q But you don't have any personal knowledge that that was done, is that correct?

THE REFEREE: He already said no.

MR. ANNENBERG: Is Your Honor sustaining an objection to the breakdown of the future expenses item?

THE REFEREE: You are talking about estimated future administrative?

- 1 Minches 182
for Liquidator - cross
2 MR. ANNENBERG: Yes, Your Honor.
3 THE REFEREE: We will give you a little
4 description of it. Let's see what questions are put.
5 Let me ask you this question. On what basis were
6 estimates on December 31, 1972, a statement of reserves,
7 made as compared with reserves that were computed
8 by Mr. Peterman's team in March of 1973? I am
9 referring to an item like the \$400,000 for deferred
10 claims. You can answer that.
11 MR. ANNENBERG: Your Honor, I don't see that.
12 Where is that?
13 THE REFEREE: First page. Go on.
14 THE WITNESS: A general overall estimate was made
15 in the Bureau over the past year or so concerning
16 what reserves we would need to satisfy the unadjudicated
17 claims in the proceeding and those were not done by
18 examining each and every file. They were projected
19 on the basis of past payment on claims and the review
20 of spot checking files and a figure was come up with
21 on that basis.
22 THE REFEREE: All right, Mr. Annenberg.
23 EXAMINATION CONTINUED
24 BY MR. ANNENBERG:
25 Q You talked about a reserve of a million and a

1

for Liquidator - cross

2 half dollars. Will you tell us how you reached that figure?

3 A I just did.

4 Q Please tell us again.

5 A I will have to add them up. I think if you go to the
6 second page you could break it down. I believe the figures
7 there reach about a million and a half.

8 Q Is it not a fact, Mr. Minches, that the 306,000
9 is an allowed claim?

10 A I am sorry, you are right. You are right.

11 (Discussion held off the record.)

12 A It was the \$528,207 for suspended claims, the 300,000 --

13 Q That is on a reserve, is that right?

14 A It was a reserve. The suspended claims.

15 Q What is the total of those suspended claims?

16 A I don't know. The next reserve figure was \$300,000
17 on claims in suit that were not reserved previously. The
18 next figure was 200 odd thousand reserved for disallowed
19 claims before Referees. And the final reserve figure
20 was the \$400,000 for reserve for deferred claims or late
21 filed claims.

22 Q Is it not a fact that the 400,000 is not a
23 reserve?

24 A Yes, it is a reserve.

25 Q What are those deferred claims?

- 1 Minches 184
for Liquidator - cross
- 2 A Claims that were filed subsequent to the last day
3 for filing claims set by the Liquidator's order of May 24,
4 1963.
- 5 Q What was the total amount of the claims?
- 6 A I have no idea.
- 7 Q Is it not a fact, Mr. Minches, that those claims
8 under the law cannot be made until all creditors have been
9 paid?
- 10 A That is correct.
- 11 Q Did Mr. Peterman make any calculation of the
12 amount that was required for the late claims?
- 13 MR. SCHLOSSBERG: Objection.
- 14 A Yes.
- 15 MR. SCHLOSSBERG: Objection. Mr. Peterman
16 testified, he was here. He gave testimony to that.
- 17 THE REFEREE: Sustained.
- 18 Q This chart that you testified that was prepared
19 by Mr. Peterman, is there anything in there in connection
20 with the late claims?
- 21 A Yes. The deferred personal injury and property damage
22 claims, under classification, the third and fourth items
23 are ~~delayed~~ claims.
- 24 Q Do you know that to be so?
- 25 A I didn't add up the figures but I know we have the

1 Minches
2 for Liquidator - cross
3 claims in the office, yes.

4 Are those the late claims?

5 Deferred claims, late claims, yes.

6 MR. ANNENBERG: I am going to recall Mr. Peterman
7 on that.

8 THE REFEREE: All right. Are we finished with
9 him?

10 MR. ANNENBERG: No, Your Honor. We have plenty
11 to go with him.

12 Q Mr. Minches, I show you Exhibit 82, this particular
13 page 47, which refers to a certificate of deposit receivable.
14 Was that the subject matter of the lawsuit?

15 A I don't know.

16 Q Pardon?

17 A I don't know.

18 Q You don't know whether that was the subject of
19 a lawsuit?

20 A No.

21 Q Do you know whether there was an adjudication
22 concerning whether that belongs to MCC?

23 A I have no idea.

24 Q Does Manhattan Casualty have any books which
25 reflect the number of claims filed, the total number of
claims filed?

1
2 A Yes, sure.

3 Q Have you produced them for this hearing?

4 A No.

5 Q And what papers reflect the amount of those
6 claims?

7 A We have papers, registers, in our office. Every claim
8 that comes in in any liquidation is registered in a book.

9 Q Have you produced them for this hearing?

10 A No.

11 MR. SCHLOSSBERG: Just so the record is clear,
12 when Mr. Annenberg asked questions previously to
13 Mr. Peterman as to the amount of claims, an objection
14 was raised and Your Honor did sustain the objection.

15 THE REFEREE: Yes.

16 MR. SCHLOSSBERG: I believe Mr. Annenberg is
17 simply asking for the same material now.

18 MR. ANNENBERG: I am entitled to his testimony.

19 MR. SCHLOSSBERG: I understand.

20 THE REFEREE: Next question.

21 Q Have any reports been made to the court since
22 the Seventh Report?

23 A No, sir.

24 Q How often were the first six reports made?

25 A I would guess once a year or a little less than that.

1

Minches

for Liquidator - cross

2 There were seven reports in the first four, five years,

3 I don't know.

4

Q Have the first seven reports been filed with the

5 court?

6 A

Yes, they have.

7

Q Do you know that of your own knowledge?

8 A

I didn't file them, no.

9

Q Mr. Minches, will you please investigate and

10 advise me where they are on file?

11

MR. SCHLOSSBERG: Objection, Your Honor.

12

THE REFEREE: All right. Sustained. Next

13

question.

14

Q As of November 27, 1967, was there a total of

15 20,450 claims filed?

16 A

I don't know.

17

Q In what writings are the number of claims set

18 forth?

19

THE REFEREE: Sustained. He just told you that

20

he doesn't know. Let's go on.

21

MR. ANNENBERG: I want to know whether he knows

22

whether there are any writings.

23

THE REFEREE: Next question.

24

Q Of the 20,450 claims filed, as of November 27,

25 1967, how many were in unstated amounts?

Minches
for Liquidator - cross

2 MR SCHLOSSBERG: Objection.

3 THE REFEREE: Sustained.

4 Q were there any claims filed after November 27,

5 11679

6 After November 27, 1967:

7 Q Yes.

8 A I don't know.

9 Q In what writings would that information be
10 contained?

11 A Any claims filed after November 22, 1963 would all
12 be categorized as deferred or late filed claims no matter
13 when they came in after that date.

14 Q Was the total money amount of the 20,450 claims
15 filed as of November 27, 1967, \$301,200,000?

16 MR. SCHLOSSBERG: Objection.

17 THE REFEREE: Sustained.

18 Q What was the dollar amount of any claims filed
19 after November 27, 1967?

20 MR. SCHLOSSBERG: Objection.

21 THE REFEREE: Sustained.

22 Q What was the dollar amount of the total late
23 claims filed as of November 27, 1967?

24 MR. SCHLOSSBERG: Objection.

25 THE REFEREE: Sustained.

MINCHES FOR LIQUIDATOR - CROSS

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1
2 Q What was the total amount of late claims filed
3 after November 27, 1967 to date?

4 MR. SCHLOSSBERG: Objection.

5 THE REFEREE: Sustained.

6 Q How many of the claims in unstated amounts were
7 reduced to liquidated amounts after November 27, 1967?

8 MR. SCHLOSSBERG: Objection.

9 THE REFEREE: Sustained.

10 MR. ANNENBERG: Do I take it that Your Honor is
11 going to sustain an objection to all my inquiries
12 concerning the total amount of the claims that were
13 made as of November 27, 1967, the date of the so-called
14 Seventh Report?

15 THE REFEREE: You put the question.

16 Q Of the 14,009 claims in stated amounts which
17 were filed as of November 27, 1967, how many did the
18 Superintendent of Insurance recommend for allowance either
19 in part or in whole?

20 MR. SCHLOSSBERG: Objection.

21 THE REFEREE: I will sustain that. And now I
22 will answer yes to your question that I am going to
23 sustain an objection to all of this type of inquiry.
24 So go on to something else.

25 MR. ANNENBERG: Your Honor, I take it that it

Minches

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1 for Liquidators - cross
2 will be deemed that I have made an offer of proof
3 as to those?

4 THE REFEREE: Yes. That ought to bring you
5 almost to the end of your cross-examination of this
6 witness? You want to recall Mr. Peterman back?

7 Q In determining the amount necessary to pay the
8 claims of Mannattan Casualty what consideration was given
9 to any monies which might be owed to the Commissioner of
10 Taxation and Finance as custodian of the Public Motor Vehicle
11 Liability Security Fund?

12 A All the monies owed to those security funds would be
13 paid in full, with all the other creditors.

14 Q How much is owed to them?

15 A As of December 31, 1972, it is \$3,892,334.86.

16 Q Is it not a fact, Mr. Minches, that you have made
17 an application before the court for a determination that
18 there either is no claim to the Commissioner of Taxation
19 and Finance as custodian or that it shall be deemed a general
20 administrative expense?

21 A No.

22 Q Mr. Minches, I would like to refer you to the
23 order to show cause indicating August 15, 1972. Will you
24 tell us what Paragraph B refers to?

25 A That refers only to administrative expense. It has

Minches

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1
2 for Liquidators - cross
noting to do in the claims.

3 Q Now let's talk about the administrative expenses.

4 Has any allocation been made for administrative expenses
5 to be paid to the Commissioner of Taxation and Finance as
6 custodian?

7 A No, sir.

8 Q What claim has he made?

9 A They haven't made any claim.

10 Q Is it not a fact that you expect that they will
11 make such a claim?

12 A We have no expectation.

13 Q Is it not a fact that you asked the court to
14 pass upon the possibility of such a claim?

15 A We have made an application to the court, yes, regarding
16 the administrative expenses under the Security Fund Sections.

17 Q Has any consideration been given to a claim for
18 administrative expenses on the part of the Motor Vehicle
19 Liability Security Fund?

20 A It would be the same answer. If there was any surplus
21 after all the creditors were paid, it is possible that money
22 would go to the Security Fund for the reimbursement of
23 their administrative expenses.

24 Q In making the computation on this exhibit called
25 "Statement of Additional Funds", was any consideration given

1 Minches
2 for Liquidators - cross
3 to the possibility of a payment for the claim of administra-
4 tive expenses to the Motor Liability Security Fund?

5 A That figure was not taken into consideration.

6 Q And was a figure for administrative expenses
7 to the Property and Liability Insurance Fund taken into
8 consideration?

9 A No.

10 Q And was a figure for administrative expenses
11 concerning the Workmen's Compensation Security Fund taken
12 into consideration?

13 A No, sir.

14 Q You have here a figure of estimated future
15 administrative expenses. Will you give us a breakdown
16 of those, please?

17 A Which figure are you talking about?

18 Q Estimated future administrative expenses.

19 A 275,000.

20 Q \$450,000?

21 A The 450,000 as I said previously they would be based
22 on the allocation of the salaries of the employees who
23 would be working on the liquidation of Manhattan Casualty
24 Company, including an allocation of all other office
25 expenses, telephone, rent, office supplies, including any
expenses that the Liquidation Bureau may have in connection

1

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6

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12

17

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24

25

1 Minister 100
2 for Liquidators - Gross
3 THE REFEREE: 275,000? What categories of

4 expenses are included in that?

5 A General liability, cases not covered by the Security
6 Fund, non-automobile cases specifically.

7 THE REFEREE: 450,000?

8 THE WITNESS: That would include automobile
9 cases but general expenses in the Bureau as expressed
10 in the final accounting, drawing up the final papers.
11 All other office expenses regarding the handling of this
12 liquidation, any type of expense.

13 Q Have the attorneys who handled the Superintendent
14 of Insurance against Bankers Life been paid in full?

15 A I don't know.

16 Q Pardon?

17 A I don't know.

18 Q Have they been paid anything?

19 A I would imagine so.

20 Q Pardon?

21 A I would imagine so.

22 Q I asked you what you know of your own personal
23 knowledge.

24 A I believe they have been paid something.

25 Q Do you know of your own personal knowledge?

26 A That they have been paid something?

- 1 Minches
2 for liquidator - cross
3 Q They have been paid.
4 A Paid something.
5 Q How much have they been paid?
6 A I don't know the figure.
7 Q What is the total amount of their fees?
8 A I don't know.
9 Q Where has provision been made in this exhibit
10 that we are referring to for the payment of the attorneys'
11 fees?
12 A I would say it would be in the \$275,000 figure.
13 Q Mr. Minches, do you know of your own knowledge
14 or are you just speculating? How much of that \$275,000
15 is allocated to attorneys' fees?
16 A I don't know.
17 Q Have their disbursements been paid?
18 A I don't know.
19 THE REFEREE: It would come within the purview
20 of this 275,000?
21 THE WITNESS: That is right.
22 THE REFEREE: All right. Are we finished with
23 him now?
24 MR. ANNENBERG: I have no further questions.
25 THE REFEREE: You want Mr. Peterman back?
MR. ANNENBERG: Yes, I do.

1 Peterman
for Liquidator - cross

2 THE REFEREE: Mr. Peterman, come back.

3 (Mr. Peterman resumed the stand.)

4 EXAMINATION BY MR. ANNENBERG:

5 Q Mr. Peterman, in making the exhibit which is
6 called "Summary of Inventory of Claims Reviewed" did you
7 give consideration to late claims filed?

8 A Yes, sir.

9 Q In what column is that?

10 THE REFEREE: The third and fourth and the --
11 well, maybe the sixth.

12 THE WITNESS: If I may refer to it under
13 classification caption, "Deferred Personal Security
14 Property Damage", the caption "Deferred General
15 Liability Filed Claims" and caption "All Others
16 Deferred and Suspended". Allowances were made, yes.

17 Q Was 933 and 250 the total of the late filed
18 claims?

19 A Yes, sir.

20 Q Does that comprise all of the late filed claims?

21 MR. SCHLOSSBERG: Just a minute, Mr. Annenberg.
22 He hadn't finished his answer.

23 A In addition to the 196 under "All Others", deferred
24 and suspended.

25 Q And are they all late filed claims?

1 Peterman

for Liquidator - cross

2 A Yes, sir. Not all of the 196.

3 Q How many of the 196 is late filed claims?

4 A I can't answer that.

5 Q Mr. Peterman, under deferred and suspended claims

6 you have 196 claims here. Page 29 of the Seventh Report

7 shows that 8,378 suspended claims were filed. Did you

8 consider all of the suspended claims?

9 MR. SCHLOSSBERG: Mr. Annenberg, if I may, just

10 to clear up --

11 MR. ANNENBERG: Mr. Schlossberg, let the witness

12 answer, please.

13 MR. SCHLOSSBERG: Your question, sir, is mis-

14 leading and I am sure we are here in a search for the

15 truth.

16 MR. ANNENBERG: We are here in a search for the

17 truth but not for vagueness.

18 MR. SCHLOSSBERG: I understand that, Mr. Annenberg.

19 MR. ANNENBERG: Okay.

20 MR. SCHLOSSBERG: Your Honor, for our benefit,

21 also, the words "suspended and deferred" are used here.

22 All of those claims are suspended in that they have not

23 been finally adjudicated. Deferred refers to the late

24 filing claims. So that when you refer, Mr. Annenberg,

25 to suspended claims in that report, we are really talking

1 Peterman
2 for Liquidator - cross
3 about everything that is open. In those classifications
4 everything here in effect is suspended because they
5 are all open. The deferred are the late files.

6 Q And how many of the 196 were late files?

7 A I don't know.

8 Q And how many of them were suspended?

9 A I don't know.

10 THE REFEREE: Are you looking at the Seventh
11 Report or reading from the Seventh Report?

12 MR. ANKENBERG: Yes, I am, Your Honor.

13 THE REFEREE: Those figures seem to jibe with
14 this chart, don't they?

15 MR. ANKENBERG: No, Your Honor.

16 THE REFEREE: In what respect?

17 MR. ANKENBERG: There are 6,378 suspended claims
18 on Page 29. He has included deferred and suspended,
19 he can't break them down but he has number 196.

20 THE REFEREE: All right. Next question.

21 MR. MARCHESIO: Just so the record is clear,
22 want to emphasize Mr. Schlossberg's observation that
23 the word "suspended" means something different in
24 the Seventh Report than it means in Mr. Peterman's
25 review report.

 THE REFEREE: That is a fact, isn't it?

Peterman, for Liquidator, Cross

MR. ANNENBERG: The witness is testifying, your Honor. He just testified he has never seen it. He testified before he has never seen it. He testified he does not know what it is all about.

THE REFEREE: That is why I made that observation that you are reading from the Seventh report and that he was reading from another document. I do not know whether they could be related. Next question.

MR. ANNENBERG: I have no further questions.

MR. SCHLOSSBERG: Your Honor, I have a few very brief questions.

EXAMINATION BY MR. SCHLOSSBERG:

Q. Mr. Peterman, you testified in response to Mr. Annenberg's questions with respect to the non-stated claims, column number 5, that you applied a multiple of \$10,000 on those claims based upon the reinsurance arrangement that Manhattan had, is that correct?

A. That is correct.

Q. Now having applied that multiple of \$10,000, that would fix the maximum liability on any one claim, is that correct, sir?

MR. ANNENBERG: Objection.

THE REFEREE: I will allow it.

A. That is correct.

24 MR. ANNUNZIO: There are many questions I have
25 to go into and there are other cases, too.

Order of Judge Markowitz, Dated October 25, 1973;
Appealed From.

At a Special Term, Part I of the Supreme Court
of the State of New York, held in and for
the County of New York, at the Courthouse
thereof, 60 Centre Street, in the Borough of
Manhattan, City and State of New York, on
the 25th day of October, 1973.

Present:

Hon. Jacob Markowitz,
Justice.

IN THE MATTER
of

The Liquidation of MANHATTAN CASUALTY COMPANY.

Index No. 40931/1963.

A motion having regularly come on to be heard before this Court on the 21st day of June 1973 for an Order confirming the report of Samuel M. Gold, Esq., Referee appointed to hear and report on the fairness of the settlement recommended in the petition of Benjamin R. Schenck, Superintendent of Insurance of the State of New York, as Liquidator of Manhattan Casualty Company, and on the objections filed by the Objectants, Florence H. Brandenburg, Executrix of the Estate of Matthew H. Brandenburg, and Harry Berg, and a cross motion in opposition having regularly come on to be heard before this Court on the same day;

Now, on reading and filing the notice of motion dated June 7, 1973, with due proof of service thereof upon

*Order of Judge Markowitz, Dated October 25, 1973,
Appealed From*

Norman Annenberg, Esq., attorney for the Objectants; the report of Samuel M. Gold, Esq., the Referee duly appointed herein, filed in the office of the Clerk of the County of New York, on June 6, 1973; the minutes of the hearing before said Referee and the exhibits received in evidence at such hearing in support of said motion, and notice of cross-motion dated June 18, 1973, in opposition thereto, and Leonard H. Minches, Esq., attorney for the Superintendent of Insurance of the State of New York, as Liquidator of Manhattan Casualty Company, appearing in support of said motion and in opposition to the cross-motion of the Objectants, and Norman Annenberg, Esq., appearing in opposition to the Liquidator's motion and in support of the cross motion, and upon the affidavits of Hon. Samuel M. Gold verified June 14, 1973 and July 17, 1973, the affidavit of Leonard H. Minches, verified July 11, 1973 and the affidavit of James W. Dowling verified August 14, 1973;

Now, upon reading and filing the order to show cause made the 15th day of August, 1972, by Hon. Charles G. Tierney, one of the Justices of the Supreme Court of the State of New York, and the petition of Benjamin R. Schenck, Superintendent of Insurance of the State of New York, as Liquidator of Manhattan Casualty Company, duly verified the 4th day of August, 1972, and the exhibits thereto annexed, with proof of due service thereof, as follows: by personal service upon:

Florence H. Brandenburg
136 Waverly Place
New York, N. Y.,

on the 22nd day of August, 1972, as evidenced by the affidavit of Joseph V. Savalli, duly sworn to the 23rd day of August, 1972; by certified mail upon:

*Order of Judge Markowitz, Dated October 25, 1973,
Appealed From*

Florence H. Brandenburg, as Executrix of
the Estate of Matthew H. Brandenburg
136 Waverly Place
New York, N. Y.

and

Lester Hirsh, Esq.
136 Sunrise Highway
Lynbrook, L. I., N. Y.,

on the 16th day of August, 1972, as evidenced by the
affidavit of George Kotler, duly sworn to the 18th day
of August, 1972; by registered mail, return receipt re-
quested, upon:

Commissioner of Taxation & Finance
Corporation Tax Bureau
State Campus
Albany, N. Y. 12226,

on the 16th day of August, 1972, as evidenced by the
affidavit of George Kotler, duly sworn to the 18th day of
August, 1972; and the certification of publication of the
New York Times, by Theresa Dowling, dated August 30,
1972; and the certification of publication of the Wall
Street Journal, by Mary C. Pandres, dated August 30,
1972; and the memorandum of the court dated December
7, 1972 and the order entered thereon on January 2, 1973
and the memorandum of this court dated September 13,
1973 and the papers on which said orders were based;
and it appearing to my satisfaction that the Superin-
tendent of Insurance of the State of New York, as
Liquidator of Manhattan Casualty Company, is vested
with title to all of the property, contracts and rights of
action of Manhattan Casualty Company and that the
Superintendent of Insurance as Liquidator, has full power
and authority to enter into the agreement dated as of

*Order of Judge Markowitz, Dated October 25, 1973,
Appealed From*

the 8th day of June, 1972, with Bankers Life and Casualty Company, Irving Trust Company, European-American Banking Corporation (formerly named Belgian-American Banking Corporation), European-American Bank & Trust Company (formerly named Belgian-American Bank & Trust Company), The Garvin Bantel Corp. (successor in interest to Garvin, Bantel & Company), The Estate of George K. Garvin by Ruth M. Garvin, as Executrix, and The Estate of James F. Begole, by Patricia C. R. Begole, as Executrix, together with the exhibits annexed to the petition, on behalf and for the benefit of the estate of Manhattan Casualty Company and all persons interested in its estate; and it further appearing therefrom to the satisfaction of this Court that the interests of Manhattan Casualty Company, in liquidation, its creditors and all other persons interested in the affairs of the Company, will best be served by the acceptance of the settlement and compromise referred to in the petition herein, and that the relief prayed for in the petition herein should in all respects be granted; and after hearing Leonard H. Minches, Esq., attorney for the Superintendent of Insurance of the State of New York, as Liquidator of Manhattan Casualty Company, in support of said motion, and Florence H. Brandenburg, Executrix of the Estate of Matthew H. Brandenburg, and Harry Berg, Objectants, by their attorney, Norman Annenberg, appearing in opposition thereto, and after due deliberation having been had thereon, and upon filing the opinion of the Court;

Now, on motion of Leonard H. Minches, Esq., attorney for the Superintendent of Insurance of the State of New York, as Liquidator of Manhattan Casualty Company, it is

ORDERED, that the motion to confirm the report of Samuel M. Gold, Esq., Referee herein, filed in the office

*Order of Judge Markowitz, Dated October 25, 1973,
Appealed From*

of the Clerk of the County of New York on June 6, 1973. be and the same is, in all respects granted, and the said report of said Referee is hereby approved and confirmed; and it is further

ORDERED, that the cross motion to disaffirm the report of the Referee herein is denied, and it is further

ORDERED, that the petition of Benjamin R. Schenck, Superintendent of Insurance of the State of New York, as Liquidator of Manhattan Casualty Company, verified the 4th day of August, 1972, annexed to the order to show cause herein, be and the same hereby is in all respects granted; and it is further

ORDERED, that said Benjamin R. Schenck, Superintendent of Insurance of the State of New York, as Liquidator of Manhattan Casualty Company, and/or his successors in office as Superintendents of Insurance of the State of New York, and/or his duly authorized Deputy and Agent, be and they hereby are authorized and permitted to compromise and settle the Liquidator's claim against Bankers Life and Casualty Company, Irving Trust Company, Belgian American Banking Corporation, Belgian American Bank & Trust Company, Garvin, Bantel & Company, New England Note Corporation. The Estate of George K. Garvin, by Ruth M. Garvin, as Executrix, The Estate of James F. Begole, by Patricia C. R. Begole, as Executrix, John F. Sweeny, and Estate of Standish T. Bourne, by Standish T. Bourne, Jr., as more particularly set forth in the petition annexed to the order to show cause, for the sum of One Million (\$1,000,000.00) Dollars; and it is further

ORDERED AND ADJUDGED, that the Commissioner of Taxation and Finance, as Custodian of the Public Motor Vehicle Liability Security Funds, the Motor Vehicle Lia-

*Order of Judge Markowitz, Dated October 25, 1973,
Appealed From*

bility Security Fund, and the Property and Liability Insurance Security Fund (Sections 330, 333 and 334 of the Insurance Law) and of the Stock Workmen's Compensation Security Fund (Article 6[a] New York Workmen's Compensation Law), is not a general creditor of Manhattan Casualty Company, in liquidation, with respect to any or all administrative expenses paid by such Funds to the Liquidator relating to claims in the liquidation proceeding coming within the purview of the aforesaid Security Funds, and has no claim therefor as such general creditor in the within liquidation proceeding. In the event surplus assets shall exist in the within liquidation proceeding after the payment in full, with interest, of all duly allowed claims in the proceeding, it is hereby directed that the Commissioner of Taxation and Finance, as Custodian of the aforesaid Funds, may make such claim to such surplus funds, upon due notice to the stockholders of Manhattan Casualty Co., as said Commissioner may be advised. Claim to such surplus funds may also be made at that time, by the stockholder; of Manhattan Casualty Company or any other claimant thereto; and it is further ordered and adjudged that said Commissioner has a prior claim to any such surplus as an administration expense; and it is further

ORDERED, that the agreement dated as of June 8, 1972, entered into between the Superintendent of Insurance, as Liquidator, and Bankers Life and Casualty Company, Irving Trust Company, European-American Banking Corporation (formerly named Belgian-American Banking Corporation), European-American Bank & Trust Company (formerly named Belgian-American Bank & Trust Company), The Garvin Bantel Corp. (Successor in interest to Garvin, Bantel & Company), The Estate of George K. Garvin by Ruth M. Garvin, as Executrix, and

*Order of Judge Markowitz, Dated October 25, 1973.
Appealed From*

The Estate of James F. Begole, by Patricia C. R. Begole, as Executrix, annexed to the petition, be and the same hereby is approved and ratified; and it is further

ORDERED, that Benjamin R. Schenck, Superintendent of Insurance of the State of New York, as Liquidator of Manhattan Casualty Company, and/or his successors in office as Superintendents of Insurance of the State of New York, and/or his duly authorized Deputy and Agent, be and they are hereby authorized and permitted to execute releases and any other instruments necessary to consummate the aforesaid settlement and to carry out and do so cause to be carried out and done, all things that may be necessary or desirable to consummate the same, upon receipt of the said sum of One Million (\$1,000,000.00) Dollars, and it is further

ORDERED, that the fee of Samuel M. Gold, Esq., as Referee appointed by order of this Court in the within matter, be and the same is hereby allowed and fixed in the sum of Thirty five thousand (\$35000.)—Dollars, and it is further

ORDERED, that the said fee of Samuel M. Gold, Esq., Referee, be paid by the Superintendent of Insurance as Liquidator of Manhattan Casualty Company as an administrative expense and shall not be taxed.

Enter

J. M.
J. S. C.

Filed 10/25/73 N. Y. County

Decision and Opinion of Judge Markowitz, Dated September 23, 1973, Confirming the Report of Judge Gold as Referee.

SUPREME COURT,

NEW YORK COUNTY,

Special Term, Part I.

[SAME TITLE.]

MARKOWITZ, J.:

The Superintendent of Insurance moves to confirm the report of Hon. Samuel M. Gold, as referee herein. Objectants Harry Berg and The Estate of Matthew H. Brandenburg, deceased, cross move for an order disaffirming the report. The referee was appointed (see, *Lazar v. Merchants' Nat. Properties, Inc.*, 22 A. D. 2d 253, 256) to hear and report on the fairness of an agreement for the settlement for \$1,000,000.00 of the Superintendent's lawsuits against ten defendants (see, Insurance Law §539).

One of the lawsuits brought by the Superintendent as liquidator of Manhattan Casualty Company is pending in the United States District Court for the Southern District of New York. The second is pending in this court. Both actions make claim for \$5,500,000.00 and involve the same defendants and the same transaction. Only the claimed bases for relief differ; the suit in the District Court having been brought under the Securities Act of 1933 (*Superintendent of Insurance, etc. v. Bankers Life and Casualty Company, et al.*, 404 U. S. 6; 92 S. Ct. 165), and the action in this court pleading causes of action for common law fraud, conversion and negligence.

Upon the evidence presented at the hearings before him, and upon the documentary evidence, the referee

Decision and Opinion of Judge Markowitz, Dated September 23, 1973, Confirming the Report of Judge Gold as Referee

recommended that the proposed settlement be approved. The well reasoned lucid report of the distinguished referee is affirmed.

His conclusions may be briefly outlined:

One million dollars, when added to the dividends paid by the Superintendent, and the assets of Manhattan Casualty Company still on hand would enable the Superintendent to pay in full all the allowed claims of the creditors of Manhattan Casualty Company, including the claim of objectant Harry Berg.

Hence, the only entity not served by the settlement is the sole stockholder of the company, vis., the Estate of Matthew H. Brandenburg.

Several of the individual defendants have died since the institution of the lawsuits. The referee finds that continuing the litigation would be costly and that success, if the actions are prosecuted through trial, is not assured. While the case against three of the actual conspirators is very strong, they are dead, and they, as well as two others who participated in the transaction, are practically judgment-proof and not good for a substantial judgment. The case against the remaining five solvent defendants is much weaker, is not supported by the same kind of proof, and is based on circumstantial evidence, dependent in large part on the testimony of a witness who may be unreliable. Indeed, as to one of these defendants, former counsel in charge of the litigation for the Superintendent testified that he did not believe that the proof would withstand a motion for summary judgment.

Passing from the merits to the amount which may be recovered after trial, the referee observes that \$5,000,000.00 of the amount in suit was received by Bankers Life and Casualty Company, the then sole stockholder of Man-

Decision and Opinion of Judge Markowitz, Dated September 23, 1973, Confirming the Report of Judge Gold as Referee

hattan Casualty Company. Thus, to use his words, this "eliminated any question of a stockholding interest in Manhattan suffering any actual pecuniary loss, so that only the remaining claimant-creditor interests in Manhattan could sue for such damages as they sustained by reason of Manhattan's being deprived of those assets and forced into insolvency." (Report, p. 14). Since the creditors, including objectant Berg, are expected to be made whole by the settlement (Report, pp. 35, 46, 49), he concludes that the proposed settlement is reasonable and fair and in the interests of all proper claimants.

It should be noted parenthetically that the Estate of Matthew H. Brandenburg derives its interest as stockholder by mesne assignment from Bankers Life and Casualty Company. The latter company sold the stock to defendant James F. Begole, one of the claimed conspirators, now dead. Defendant Begole transferred the stock to Matthew Brandenburg, his attorney, for legal services rendered and to be rendered. Because, as a consequence of the conspiracy, defendant Begole obtained the stock "without a single penny of his own" (Report, pp. 15, 35), he could claim no damages arising from transaction; and the Estate of Matthew Brandenburg has no greater rights than defendant Begole.

In this posture of the case, this ten year costly and protracted litigation should be brought to an end. In reaching this judgment, the court need not "balance the scales with the nicety of an apothecary" (*Shielcrawt v. Moffet*, 59 N. Y. S. 2d 619, 621). It is guided, instead, by basic principles intended to lead to a pragmatically sound judgment whether a proposed settlement is fair and reasonable under all the circumstances. (*Rodgers v. Sound of Music Co.*, Misc. 2d : 343 N. Y. S. 2d 672, 677-678; *Heimann v. American Express Co.*, 53 Misc.

Decision and Opinion of Judge Markowitz, Dated September 23, 1973, Confirming the Report of Judge Gold as Referee

2d 749, 767; *Matter of New York Title & Mortgage Co.*, 170 Misc. 109; *Waterman Corp. v. Johnston*, 106 N. Y. S. 2d 813. aff'd 279 App. Div. 1073).

Agreements of compromise are generally favored by the courts (*Zenno v. Anzalone*, 17 Misc. 2d 897, 898); the determination of sharply contested and dubious issues should, if possible, be avoided (*Matter of Prudence Co.*, 98 F. 2d 559, 560, cert. den. sub nom. *Stein v. McGrath*, 206 U. S. 636).

Under a settlement, each side surrenders something; neither side need be put in the position to sing paeans of triumph as on a victory won after trial. Moreover, when the settlement is proposed by the Superintendent of Insurance, his judgment, as an administrative officer of the state, "is entitled to great weight and is not lightly to be set aside." (*Matter of New York Title & Mortgage Co.*, supra, p. 116). The Superintendent strongly urges settlement of the litigation under review.

The Superintendent's motion to confirm the referee's report is granted and the proposed settlement is approved. The cross motion is denied.

I find no merit in objectants' arguments that the referee afforded them inadequate opportunity to meet the issues before him and that this court has no jurisdiction to approve the settlement of the Federal action (*Matter of Knickerbocker Agency [Holz]*, 4 N. Y. 2d 245).

Settle order accordingly, also making provision for an allowance to the referee, which will be fixed in the order.

Dated: September , 1973.

s/ J. M.
J. S. C.

**Order of Judge Markowitz, Dated January 2, 1973,
Appointing Judge Gold as Referee.**

At a Special Term, Part I of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse thereof, 60 Centre Street, in the Borough of Manhattan, City and State of New York, on the 2nd day of January, 1973.

Present:

Hon. Jacob Markowitz, Justice.

[SAME TITLE.]

The petitioner, Benjamin R. Schenck, Superintendent of Insurance of the State of New York, as Liquidator of Manhattan Casualty Company, having moved this Court for an order

(a) Authorizing and directing the Superintendent of Insurance, as Liquidator, to compromise and settle the Liquidator's claim against Bankers Life and Casualty Company, Irving Trust Company, Belgian American Banking Corporation, Belgian American Bank & Trust Company, Garvin, Bantel & Company, New England Note Corporation, The Estate of George K. Garvin, by Ruth M. Garvin, as Executrix, The Estate of James F. Begole, by Patricia C. R. Begole, as Executrix, John F. Sweeny, and Estate of Standish T. Bourne, by Standish T. Bourne, Jr., for the sum of One Million (\$1,000,000.00) Dollars;

(b) Adjudging that the Commissioner of Taxation and Finance, as Custodian of the Public Motor Vehicle Liability Security Funds, Motor Vehicle Liability Security Fund, the Property and Liability Insurance Security Fund, and Workmen's Compensation Security Fund (established by Sections 330, 333 and 334 of the Insurance Law and Article 6[a] of the New York Workmen's Com-

*Order of Judge Markowitz, Dated January 2, 1973.
Appointing Judge Gold as Referee*

pensation Law, respectively.) has either no claim for administrative expenses relating to claims in the liquidation proceeding of Manhattan Casualty Company coming within the purview of the aforesaid Security Funds and paid by said Funds, or has a claim for such expenses which is subordinate to the claims of the general creditors of such Company;

(c) Approving and ratifying the agreement dated as of June 8, 1972, entered into between the Superintendent of Insurance, as Liquidator, and Bankers Life and Casualty Company, Irving Trust Company, European-American Banking Corporation (formerly named Belgian-American Banking Corporation), European-American Bank & Trust Company (formerly named Belgian-American Bank & Trust Company), The Garvin Bantel Corp. (successor in interest to Garvin, Bantel & Company), The Estate of George K. Garvin by Ruth M. Garvin, as Executrix, and The Estate of James F. Begole, by Patricia C. R. Begole, as Executrix; and

(d) Authorizing the Superintendent of Insurance, as Liquidator, by his duly authorized Deputy and Agent, to execute releases and any other instruments necessary to consummate the aforesaid settlement and to carry out and do and so cause to be carried out and done all things that may be necessary or desirable to consummate the same, upon receipt of the sum of One Million (\$1,000,000.00) Dollars; and said motion having duly come on to be heard before this Court on the 19th day of October, 1972;

Now, upon reading and filing the order to show cause made the 15th day of August, 1972 by Hon. Charles G. Tierney, one of the Justices of the Supreme Court of the State of New York, and the petition of Benjamin R. Schenck, Superintendent of Insurance of the State of

*Order of Judge Markowitz, Dated January 2, 1973,
Appointing Judge Gold as Referee*

New York, duly verified the 4th day of August, 1972,
and the exhibits thereto annexed, with proof of due service thereof, as follows: by personal service upon:

Florence H. Brandenburg
136 Waverly Place
New York, N. Y.,

on the 22nd day of August, 1972, as evidenced by the affidavit of Joseph V. Savalli, duly sworn to the 23rd day of August, 1972; by certified mail upon:

Florence H. Brandenburg,
As Executrix of the Estate
of Matthew H. Brandenburg
136 Waverly Place
New York, N. Y.,

and

Lester Hirsh, Esq.
136 Sunrise Highway
Lynbrook, L. I., N. Y.,

on the 16th day of August, 1972, as evidenced by the affidavit of George Kotler, duly sworn to the 18th day of August, 1972; by registered mail, return receipt requested, upon:

Commissioner of Taxation & Finance
Corporation Tax Bureau
State Campus
Albany, N. Y. 12226,

on the 16th day of August, 1972, as evidenced by the affidavit of George Kotler, duly sworn to the 18th day of August, 1972; and the certification of publication of the New York Times, by Theresa Dowling, dated August 30, 1972; and the certification of publication of the Wall Street Journal, by Mary C. Pandres, dated August 30,

*Order of Judge Markowitz, Dated January 2, 1973,
Appointing Judge Gold as Referee*

1972; the affidavit of Leonard H. Minches, sworn to September 26, 1972, in support thereof, and the affidavit of Leonard H. Minches, sworn to October 11, 1972, in support of the Liquidator's motion and in opposition to the cross-motion of Harry Berg and Florence H. Brandenburg, as Executrix of the Estate of Matthew H. Brandenburg; the affidavit of Joseph J. Marcheso sworn to July 20, 1972 the letter from the Superintendent of Insurance, as Liquidator, to Hon. Jacob Markowitz, a Justice of the Supreme Court, dated October 19, 1972, with enclosure of a transcript of a hearing of May 5, 1972 held before Hon. Charles L. Bricant, District Judge of the United States District Court, Southern District of New York, all in support of the motion; the affirmations of Norman Annenberg, attorney for respondents-objectors Harry Berg and Florence H. Brandenburg, as Executrix of the Estate of Matthew H. Brandenburg, dated September 19, and 26, 1972; the answer to the petition of respondent-objector Harry Berg and respondent-objector Florence H. Brandenburg, as Executrix of the Estate of Matthew H. Brandenburg, verified September 20, 1972; the affidavit of Norman Annenberg, sworn to October 18, 1972, in opposition thereto; and the notice of cross-motion dated September 22, 1972 for an order staying the proceeding in this Court and transferring it to the United States District Court, for the Southern District of New York, and for other relief; and it appearing to my satisfaction that the Superintendent of Insurance of the State of New York, as Liquidator of Manhattan Casualty Company, is vested with title to all of the property, contracts and rights of action of Manhattan Casualty Company; and after hearing Leonard H. Minches, Esq., attorney for the Superintendent of Insurance of the State of New York, as Liquidator of Manhattan Casualty Company, in support of the motion of the Superintendent of Insur-

*Order of Judge Markowitz, Dated January 2, 1973,
Appointing Judge Gold as Referee*

ance, as Liquidator, and in opposition to the cross-motion; and after hearing Norman Annenberg, Esq., attorney for respondents-objectors Harry Berg and Florence H. Brandenburg, as Executrix of the Estate of Matthew H. Brandenburg, in opposition to the motion of the Superintendent of Insurance, as Liquidator, and in support of the cross-motion;

Now, on motion of Leonard H. Minches, Esq., attorney for the Superintendent of Insurance of the State of New York, as Liquidator of Manhattan Casualty Company, it is

ORDERED, that the fairness of the proposed settlement, as set forth in the petition of the Superintendent of Insurance, as Liquidator, be and the same hereby is referred to Hon. Samuel Marshall Gold, of 595 Madison Avenue N.Y.C. 10022 N.Y. who is hereby appointed Referee to hear, take evidence on the said issue and report thereon with all convenient speed; and it is further

ORDERED, that the aforesaid Referee shall conduct the hearings at the place of business of the Superintendent of Insurance, as Liquidator, namely, 116 John Street, Borough of Manhattan, City and State of New York; and such other places as the referee may from time to time, designate and it is further

ORDERED, that at least five (5) days before the said hearing, a notice thereof, in writing, shall be sent by mail by the Liquidator to Norman Annenberg, Esq., attorney for respondents; and it is further

ORDERED, that pending the report of the Referee, the within motion be and the same hereby is held in abeyance; and it is further

*Order of Judge Markowitz, Dated January 2, 1973,
Appointing Judge Gold as Referee*

ORDERED that the fees of the Referee shall be fixed by the Court; and it is further

ORDERED, that the cross-motion of the respondents Harry Berg and Florence H. Brandenburg, as Executrix of the Estate of Matthew H. Brandenburg, be and the same hereby is in all respects denied.

Enter

J. M.
J. S. C.

Filed
1/2/73
N.Y. County

**Decision of Judge Markowitz, Dated December 7, 1972,
Appointing Referee.**

SUPREME COURT,

NEW YORK COUNTY,

Special Term Part I.

[SAME TITLE.]

JACOB MARKOWITZ, J.:

Petitioner, the Superintendent of Insurance of the State of New York, appointed Liquidator of the subject insurance company (Manhattan Casualty Company) by order issued in 1963, seeks court approval of the settlement of two actions in which petitioner, acting as Liquidator, is plaintiff. One of these actions is pending in this Court, and one in the United States District Court for the Southern District of New York. In the proposed settlement \$1,000,000 will be paid petitioner. Petitioner asserts that this would result in payment in full of all allowed claims of creditors.

Objections to the settlement are raised by one creditor of Manhattan and by the estate of the now deceased and alleged sole shareholder of Manhattan. They contend that the potential recovery in the actions sought to be settled approximates \$5,000,000 and that, accordingly, the proposed settlement is unreasonable.

The moving papers contain descriptions of the nature of the claims asserted by petitioner and the history of the litigation, but little more. This is insufficient evidence on which to find the proposed settlement adequate, even after granting petitioner's judgment the substantial weight to which it is entitled (cf. New York Title & Mortgage Co., 170 Misc. 106).

*Decision of Judge Markowitz, Dated December 7, 1972,
Appointing Referee*

Objectors' arguments that this court lacks jurisdiction to pass on the settlement are not well founded. In addition to the specific provisions of Insurance Law, sections 526 and 539, the applicable decisional law indicates general recognition of the jurisdiction of this court over matters such as this (*Matter of Knickerbocker Agency*, 4 N. Y. 2d 245, 252), even where claims of federal agencies are involved (see, *Katin v. Apollo Savings*, 318 F. Supp. 1055). In the instant case no such federal claims are actually present; the objectors arguments are based upon the federal nature of the claims asserted by petitioner in the United States District Court. *A fortiori*, this does not interfere with this court's jurisdiction.

A referee will be appointed to hear and report on the fairness of the settlement. Pending the report of the referee the motion will be held in abeyance. Cross motion is denied.

Settle order.

Dated: December 7, 1972.

J. M.
J. S. C.

Report of Referee, Dated June 4, 1973.
 SUPREME COURT OF THE STATE OF NEW YORK,
 COUNTY OF NEW YORK.

[SAME TITLE.]

To the Supreme Court of the State of New York:

I, SAMUEL M. GOLD, referee appointed in the above-entitled proceeding by order of this Court, dated January 2, 1973, to hear, take evidence and report on the issue of the "fairness of the proposed settlement, as set forth in the petition of the Superintendent of Insurance, as Liquidator" (Markowitz, J.), do hereby respectfully report as follows:

subdivision (a) and subdivision (2).

NATURE OF THE PROCEEDINGS

A. Time-Table

1. *January 24, 1962*—Sale by Bankers Life and Casualty Company (hereinafter "Bankers Life"), sole stockholder of Manhattan Casualty Company (hereinafter "Manhattan"), to one James F. Begole (hereinafter "Begole"), of all the outstanding shares of Manhattan for the sum of Five Million (\$5,000,000) Dollars, said transaction and the developments arising therefrom being the cause of Manhattan's insolvency and the subject-matter of the lawsuits here involved.

2. *May 24, 1963*—Order of Supreme Court, New York County, adjudging Manhattan to be insolvent, appointing Thomas Thacher, Superintendent of Insurance of the State of New York, as Liquidator of Manhattan, and providing for notice to claimants to file their claims within six months from date of entry thereof and no later than November 22, 1963.

Report of Reference, Dated June 4, 1973

3 August 19, 1963—Commencement of action in the United States District Court, for the Southern District of New York, "63 Civ. 2490," pursuant to Section 17A of the Securities Act of 1933 (15 U.S.C.A. §77q[1a]), by the Superintendent against ten defendants, demanding judgment for \$5,500,000 (the aforementioned \$5,000,000 plus a subsequent allegedly converted sum of \$500,000), that action being entitled:

Superintendent of Insurance of the State of New York,
as Liquidator of Manhattan Casualty Company,
Plaintiff,

versus

Bankers Life and Casualty Company, Irving Trust Company [hereinafter "Irving Trust"], Belgian American Banking Corporation [hereinafter "BA Banking"], Belgian American Bank & Trust Company [hereinafter "BA Trust"], Garvin, Bantel & Company [hereinafter "Garvin, Bantel"], New England Note Corporation, George K. Garvin [hereinafter "Garvin"], James F. Begole, John F. Sweeny [hereinafter "Sweeny"], and Standish T. Bourne [hereinafter "Bourne"],
Defendants.

4. July 23, 1965—Commencement of action in Supreme Court of the State of New York, New York County, "11358/65," bearing the same title, involving the same transaction, seeking the same amount of damages, but pleading causes of action for common law fraud, conversion and negligence.

5. November 8, 1971—Decision of Supreme Court of the United States (404 U. S. 6), reversing the order dismissing the federal action (the District Court order for dismissal having been affirmed by the Court of Appeals for the Second Circuit), and holding that a cause of action had been alleged under §10(b), 15 U.S.C. §78 (j)(b) of

Report of Referee, Dated June 4, 1973

the Securities Exchange Act, remanding the case for trial on the merits.

6. *June 8, 1972*—Agreement of settlement, subject to approval of Supreme Court of the State of New York, County of New York, of the Liquidator's said claim against the ten defendants, providing for the payment of One Million (\$1,000,000) Dollars, executed by seven "Settling Defendants" (not including New England Note Corporation, Sweeny and Bourne) and binding upon the "Settling Defendants," payment to be made on the Closing Date (the tenth business day following expiration of time for appeals), the federal action to be thereupon dismissed with prejudice and the Supreme Court action to be discontinued with prejudice as against all ten defendants and general releases to be delivered to said defendants.

7. *August 15, 1972*—Order to show cause for approval of said settlement, authorizing and directing the Superintendent of Insurance as Liquidator, to compromise and settle the claim (objections filed by one claimant and by estate of alleged sole shareholder of Manhattan and cross-motion by said objections to stay the compromise proceeding in the Supreme Court and to transfer it to the District Court).

8. *December 7, 1972*—Decision of Justice Markowitz denying the cross-motion and appointing referee to hear and report on the fairness of the settlement, the motion for approval thereof being held in abeyance pending the report of the referee.

9. *January 2, 1973*—Order herein appointing me as referee.

10. *January 5, 1973*—I duly took and executed the oath required of me as referee, and the same has been filed with this Court.

Report of Referee, Dated June 4, 1973

B. The Motion for Leave to Compromise

The order to show cause directed service upon all persons interested in the estate of Manhattan by publication in *The New York Times* and *The Wall Street Journal*; upon the administratrix of the estate of Matthew H. Brandenburg, the alleged sole stockholder of Manhattan, by personal service; and upon the Commissioner of Taxation and Finance of the State of New York by registered mail. There were annexed copies of the signed Agreement of settlement and of the proposed forms of stipulation of dismissal and discontinuance of the two actions and general release.

The petition of Benjamin R. Schenk, the then Superintendent of Insurance, stated that, to date thereof, dividends of 50% had been paid in the liquidation on the allowed claims of general creditor claimants; that the remaining assets would produce an additional 10% or 15%; and that the One Million (\$1,000,000) Dollars settlement would enable the Liquidator to pay in full all the allowed claims of said creditors, including deferred or late claims. With respect to the two pending actions, he pointed out that several of the individual defendants had died since their institution; that the continuing litigation would be very costly; and that counsel for the Liquidator had advised that the success of those actions was in doubt.

With regard to the Commissioner of Taxation and Finance, it was stated that the Commissioner, as Custodian of certain Security Funds, had agreed that those administrative expenses incurred by the Superintendent on this liquidation coming within the purview of Sections 330, 333 and 334 of the Insurance Law and Article 6(a) of the Workmen's Compensation Law and paid by those Security Funds may not be included in general creditor claims against the assets of Manhattan.

Report of Referee, Dated June 4, 1973

It was also requested that notice of the motion by personal service be directed to be given to the administratrix of the estate of Matthew H. Brandenburg, who had written to the Superintendent of Insurance, claiming to be the sole stockholder of Manhattan, though the records of Manhattan did not disclose who were the present stockholders.

The supporting affidavit of Joseph J. Marcheso, the present attorney for the Superintendent of Insurance in the two actions, stated that his former partner, Arnold Bauman, had been the attorney for the Superintendent in these actions until he was appointed a Judge of the United States District Court for the Southern District of New York; that Arnold Bauman had made unsuccessful attempts at settlement during the course of the litigation, which were renewed by defendants after Arnold Bauman had obtained the reversal in the United States Supreme Court, holding that the federal court did have jurisdiction, resulting in the proposed agreement of settlement for \$1,000,000; that it was Mr. Marcheso's understanding that it would permit payment substantially in full to all the creditors and policyholders of Manhattan. He referred to the fact that continued litigation would undoubtedly require expenditure of considerable moneys and a lengthy trial, and that there was always the uncertainty of the final determination and the prospects of expensive and lengthy appeals by either side. He concurred in the opinion of Judge Bauman urging favorable consideration of the \$1,000,000 settlement offer.

Norman Annenberg, Esq., filed papers in opposition to the motion on behalf of two respondent-objectors (Harry Berg, a creditor of Manhattan, on his own behalf and on behalf of all creditors similarly situated; and Florence H. Brandenburg as executrix of the estate of Matthew H. Brandenburg, "sole stockholder" of Manhattan) and made

Report of Referee, Dated June 4, 1973

the aforementioned cross-motion to transfer the compromise proceeding to the District Court.

Justice Markowitz stated in his decision:

"The moving papers contain descriptions of the nature of the claims asserted by petitioner and the history of the litigation, but little more. This is insufficient evidence on which to find the proposed settlement adequate, even after granting petitioner's judgment the substantial weight to which it is entitled (cf. *New York Title & Mortgage Co.*, 170 Misc. 109)."

C. Proceedings on Reference

I received a letter on January 4, 1973 from Leonard H. Minches, attorney for the Superintendent of Insurance, as Liquidator of Manhattan, enclosing certified copy of order dated January 2, 1973 and, after execution and filing of my oath as referee, I arranged for conference on procedure at the office of James Dowling, Special Deputy Superintendent of Insurance, in charge of liquidations, at which Joseph J. Marcheso, Norman Annenberg, and attorneys representing the Liquidator, were present. The matter was discussed generally and, an issue having arisen as to the burden of proof, I held that the Liquidator must, in the first instance, establish facts sufficient to justify the settlement. It was agreed that Mr. Annenberg would be permitted, for the purpose of preparing for the hearings, to examine at the office of Mr. Marcheso the depositions taken in the federal action over a period of approximately five years of 48 persons, their testimony aggregating more than 12,000 pages, with approximately 1,700 exhibits being marked for identification. It was agreed that I was to receive copies of relevant papers and documents to be submitted by Mr. Marcheso and Mr. Minches, as well as

Report of Referee, Dated June 4, 1973

Mr. Annenberg, and that, after studying such papers, I would request such additional papers and documents as I deemed useful in preparing for and facilitating the hearings to be held.

Shortly thereafter I received copies of all the papers submitted by both sides on the motion for approval of the settlement, the Appendix in the Supreme Court of the United States, the decision of Justice Douglas, the petition for writ of certiorari to the Court of Appeals for the Second Circuit, and the briefs filed by Mr., now Judge, Bauman.

After studying these papers and documents I concluded that, since the validity and strength of the underlying cause of action against the ten defendants depended on these pretrial depositions and exhibits, it was necessary to make as complete a study and analysis of them as would be required at a trial of the underlying actions. Mr. Marcheso and his associate, Morton J. Schlossberg, and Mr. Annenberg were advised as to my request for additional papers, and Mr. Annenberg thereupon included in his request for access to records the substance of my request. Mr. Annenberg requested rulings from me with regard to his receiving copies of certain records and photostats of exhibits, concerning which a question of limitation was raised in light of the still pending litigation. One aspect of these preliminary procedural matters was reviewed and further argued at the outset of the first hearing (3-9).*

I received a copy of the 57-page Preliminary Pre-Trial Memorandum filed by Arnold Bauman in the District Court on June 24, 1968 and of the Master Index of 756 exhibits. (Mr. Annenberg also received copies.) I also requested and received four volumes containing summaries of the depositions of all the witnesses and

*Numbered references in this report are to the minutes of the hearings before the referee herewith filed.

Report of Referee, Dated June 4, 1973

the complete transcript of the depositions of John F. Sweeny, Paul Sandrisser, C. Joseph Gunter, and Louis Van Damme, the principal witnesses, all of which had been available for examination and a substantial portion of which had actually been examined by Mr. Annenberg. I also received (and Mr. Annenberg, likewise, after a ruling pertaining to confidentiality of several, received all such copies—see 109) photostatic copies of about 120 exhibits selected by me after study of all the papers as the most significant. In addition, I received from Mr. Minches copies of all the volumes of the seven Reports filed in the liquidation proceeding from 1963-1967 and the relevant orders of the court (which were made available for Mr. Annenberg's examination and the three volumes, comprising the last 1967 Report, were at his request delivered to him for study and returned after about a week to me), as well as copies of certain financial statements subsequently deemed exhibits on the hearings (Mr. Annenberg also receiving copies thereof prior to the hearings).

With respect to exhibits, it was provided (11-13, 72, 82-83, 102-104, 115, 156, 159-165) that, in view of the pendency of the underlying litigation, the voluminous nature of many of the exhibits, and the fact that many are filed documents, those exhibits particularly considered on the reference would not be numbered, but be deemed exhibits; and subsequent arrangements were made by which such deemed exhibits, except those already filed or contained in documents already filed in the New York County Clerk's office, were to be delivered by Mr. Marchese to the Clerk of Special Term, Part I, at the time a motion is presented to that Part for confirmation or rejection of this Report, the exhibits to be so delivered to be the following:

Report of Referee, Dated June 1, 1973

Pre-Trial Memorandum filed in the District Court on June 24, 1968;

Master Index of Exhibits;

Appendix in the Supreme Court of the United States;

Opinion of Justice Douglas;

With reference to Banker Life's motion for summary judgment, Rule 9G statement, affidavit of Arnold Bauman sworn to May 7, 1968, affidavit of Isaac Goldstein sworn to May 9, 1968 [requested by Mr. Annenberg];

Master Index Exhibits Nos. 183, 184, 705 [requested by Mr. Annenberg];

Statement of Assets, Liabilities and Reserves as at May 24, 1963 and as at July 31, 1967;

Statement of Additional Funds Required to Pay all Claims as at December 31, 1972;

Summary of Inventory of Claims Received, Evaluated and Reserved (February-March, 1973);

Four sets of Exhibits *re*: Collectibility of Judgment against the four individual defendants;

and, in addition, any exhibits specifically referred to or requested to be included by either Mr. Marcheso or Mr. Annenberg in their post-hearing memoranda.

Mr. Annenberg had requested that all three decisions in the District Court, Court of Appeals, and Supreme Court of the United States, be deemed in evidence (109); it will be noted that the first two are contained in the Appendix in the Supreme Court of the United States, which is included in the list of deemed exhibits.

The hearings were held at my office on March 19, 1973 and April 9, 1973. The appearances were: James W. Dowling, Special Deputy Superintendent, Liquidation Bureau; Joseph A. Oster, Assistant General Counsel, Insurance Department; Leonard H. Minches, Assistant Special Deputy Superintendent of Insurance;

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Joseph J. Marchese and Morton J. Schlossberg, attorneys for Liquidator; Norman Annenberg, attorney for Objectors Harry Berg and Estate of Matthew Brandenburg.

The only witnesses who testified were those presented by the Liquidator: Judge Bauman, Leonard H. Minches, and Allen E. Peterman, whose duties in the Liquidation Bureau of the Superintendent of Insurance consisted of review and evaluation of claims. Mr. Annenberg had stated for the record at my request the nature and status of the claims of Harry Berg and the Estate of Matthew Brandenburg, represented by him (104-108) and at the conclusion of the hearings stated that he was not presenting any witnesses but would make his point "through documents" and asked for time to submit his post-hearing memoranda, and accordingly it was arranged for both sides to submit their memoranda by May 7, 1973 (200-201). On May 7, 1973 I received a memorandum from Joseph J. Marchese (Morton J. Schlossberg, of Counsel). I received on that day a telephone call from Mr. Annenberg that, due to the press of personal and other matters, he had been unable to prepare a memorandum and would not submit any memorandum. He confirmed this fact by a letter to me.

ANALYSIS OF THE ISSUE HERE INVOLVED—THE FAIRNESS OF
THE ONE MILLION (\$1,000,000) DOLLARS SETTLEMENT

There are obviously two parts to the question of the fairness of a proposed settlement of a pending case:

1. The chances of recovering a judgment against defendants from whom a substantial judgment is collectible; and
2. The amount of damages recoverable after trial in the case.

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To be taken into consideration, to be sure, are such matters as the time and expense of a trial, appeals, delays, and the element of uncertainty affecting any case, particularly where the matter depends on inferences and circumstantial evidence.

(a) Here it is clear from all the papers in the underlying motion that the case against Bourne, Begole and Garvin, the actual conspirators who planned and consummated the plan to have Begole purchase Manhattan's stock from Bankers Life with Manhattan's own assets, is a very strong one; and that the case against New England Note Corporation, Bourne's corporate tool, and Sweeny, who participated in covering-up the transaction after he became aware of the fraud and conversion of Manhattan's assets, is a fairly strong one, although the damages as to them might be placed on a lesser footing than as against the actual conspirators. However, Bourne, Begole and Garvin have died and it is clear from the record and the documentary evidence at the hearing (See Four Sets of Exhibits *re* Collectibility of Judgment: 159-165) that these five defendants are practically judgment-proof and certainly not good for any substantial judgment.

The question, therefore, narrows down to the chances of recovering a judgment against the remaining defendants—Irving Trust, BA Banking, BA Trust, Garvin Bantel, and Bankers Life. It will be seen that the evidence involving the first three—the banks—depends on inferences to be drawn tending to indicate that they did not follow sound banking practices and were negligent, thereby facilitating the use by the conspirators of their banking services to consummate their plan. Garvin Bantel appears to be involved only as the means by which Garvin made arrangements with the banks, Bankers Life, Manhattan's sole stockholder, which sold its Manhattan stock to Begole for \$5,000,000, consisting

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of an Irving Trust check, is not shown by any evidence in the voluminous depositions and exhibits to have had any knowledge of the fact that the actual source of the \$5,000,000 it received would be Manhattan's own assets or to have participated in or been connected with the fraud. There might possibly be a case against it on some insolvency theory that, if an adequate judgment is not recovered against financially responsible defendants, it should be required to return to Manhattan that portion of the \$5,000,000 as is needed to make claimants and creditors whole, since the \$5,000,000, which Bankers Life received and of which Manhattan was deprived to provide the conspirators, through Begole, with Manhattan's stock caused Manhattan to be insolvent and resulted in the liquidation proceedings. But the case itself as against Bankers Life on the basis of fraud or conversion is, according to all the records, entirely unsupported.

The opinion of Judge Bauman, who was in charge of this litigation for nine years, and that of Mr. Marcheso, his former partner and the present attorney for the Superintendent, both of whom devoted a tremendous amount of time to the conduct of these extended and protracted pre-trial depositions, in the necessary effort to prove the case through the testimony and records of the defendants, their officers and employees, are quite obviously entitled to great weight. Judge Bauman testified, as did Mr. Marcheso, that the case against the individual defendants was strong and fairly direct, while the case as to the defendants who were financially responsible was not supported by the same kind of proof, was based on circumstantial evidence, and dependent in large part on the testimony to be elicited from Sweeny, an unreliable witness (24-32, 40-42). As to Bankers Life, Judge Bauman testified (23-24) that, while he had submitted papers in opposition to its motion in the District Court for summary judgment (See Exhibits) and had urged that there

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was a question of credibility and of fact as to whether it had knowledge of the fraud charged in the sale of Manhattan's assets, the motion being denied without prejudice to renewal after, the jurisdictional motion was disposed of (See Appendix in the Supreme Court, pp. 40a-44a), he did not believe that his proof would withstand a motion by Bankers Life for summary judgment. As to Irving Trust and BA Banking and BA Trust, he believed the proof showed "suspicious" conduct on their part, particularly in attempting to cover-up (25-28). As to Garvin Bantel, in his view, the other members of the firm did not know what Garvin was doing (28). In his opinion, the case against the banks could go "either way" (25). He summed up his position as to liability, that it was a "fifty-fifty" proposition (36).

(b) While the underlying lawsuit is for \$5,500,000, it is quite clear that the judgment recovered could not be for that amount.

The measure of damages for fraud as a general rule is the actual pecuniary loss sustained, the purpose being to indemnify the party injured (*Reno v. Bull*, 226 N. Y. 546; *Hanlon v. McFadden Publications, Inc.*, 302 N. Y. 502).

Here, the sole stockholder of Manhattan, Bankers Life, received the \$5,000,000 which actually was derived from Manhattan's own assets. This eliminated any question of a stockholding interest in Manhattan suffering any actual pecuniary loss, so that only the remaining claimant-creditor interest in Manhattan could sue for such damages as they sustained by reason of Manhattan's being deprived of those assets and forced into insolvency. A corporation consists of stockholders and creditors (here claimants). Here there are no stockholders to be considered, so that only the damages sustained by creditors (here claimants) are recoverable.

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Plainly, Begole, who, as one of the conspirators, obtained the stock from Bankers Life by fraudulent use of Manhattan's own assets and without a single penny of his own, could not claim any damages; indeed, he is liable for the damages. And, by the same token, Matthew Brandenburg, his attorney, who allegedly obtained the stock by transfer or assignment from Begole in 1963, just about the time of these insolvency proceedings, allegedly for legal services rendered and to be rendered in connection with this lawsuit (104-107), can have no greater rights than Begole to claim the status of a true stockholder of Manhattan.

Thus, the damages recoverable at a trial would be the amount needed, in addition to whatever other assets Manhattan had, to pay all proper claimants of Manhattan, as well as the expenses of the lawsuit and of the liquidation proceeding (see my preliminary statement, 9-14, and 36-40).

In this connection, note may be taken of an affirmative defense in the answers of defendants Irving Trust and Garvin Bantel (Appendix in the Supreme Court of the United States, pp. 26a-27a, 33a-34a): that the Superintendent's Report to the Supreme Court of the State of New York indicated that as of March 31, 1963 there was an excess of liabilities over admitted assets of Manhattan in the amount of \$1,202,161.86, so that the damages of \$5,500,000 sued for was primarily for the benefit of the dissolved Manhattan's shareholders; if, as the Superintendent himself alleges, the sole stockholder of Manhattan (Begole) participated in the fraud upon Manhattan, "any present holder of its stock either participated in the alleged fraud or became a stockholder subsequent thereto and cannot share in the distribution of any recovery for damages suffered as a result of such fraud. Plaintiff does not have the right to maintain this action as the representative of any such stockholder, nor to recover damages for distribution to any such stockholder."

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Judge Bauman testified that William Willis of Sullivan and Cromwell, attorneys for BA Banking and BA Trust, with whom he had discussed at various times and finally arranged the proposed settlement, had repeatedly stated to him that the "maximum exposure" of defendants was \$1,300,000 and that, basically the point of view of Mr. Willis was that the only damages recoverable would be those suffered by proper claimants (35, 37-38). He testified that he was not able to obtain the million dollar offer until after the Supreme Court of the United States sustained the complaint in the federal action (22). He ascertained from Isaac Goldstein, Special Deputy Superintendent of Insurance, in charge of the Liquidation Bureau, that \$1,000,000 would probably make the claimants "whole," that is, "proper" or "legitimate" claimants, and, therefore, recommended the settlement on the ground that liability was far from certain as to financially responsible defendants and that the amount of damages was open to question (36, 37, 40, 50, 51).

Since the maximum amount recoverable in the underlying action is the amount of damages suffered by claimants, plus the expenses of the lawsuit and of the liquidation, the amount recoverable at the trial would be in the range of \$1,000,000, the amount estimated to be needed to accomplish that result (See final portion of this Report). Thus, regardless of the relative strength of the case against responsible defendants, the \$1,000,000 settlement is within the range of the maximum amount recoverable after a trial and, therefore, eminently fair.

THE UNDERLYING CAUSE OF ACTION

A. The Complaint

The federal complaint was based on the claim that Manhattan had been defrauded in the sale of certain securities in violation of the Securities Act of 1933, 15

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U.S.C. §77q(a), and of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b).

The complaint in New York County Supreme Court was based on the same transaction but pleading common law fraud, conversion and negligence in five causes of action against the same ten defendants.

The basic allegations of the complaint were clearly and succinctly summed up by Justice Douglas:

"It seems that Bankers Life, one of the respondents, agreed to sell all of Manhattan's stock to one Begole for \$5,000,000. It is alleged that Begole conspired with one Bourne and others to pay for this stock, not out of their own funds, but with Manhattan's assets. They were alleged to have arranged, through Garvin, Bantel—a note brokerage firm—to obtain a \$5,000,000 check from respondent Irving Trust, although they had no funds on deposit there at the time. On the same day they purchased all the stock from Bankers Life for \$5,000,000 and as stockholders and directors, installed one Sweeney as president of Manhattan.

"Manhattan then sold its United States Treasury Bonds for \$4,854,552.67.¹ That amount, plus enough cash to bring the total to \$5,000,000, was credited to an account of Manhattan at Irving Trust and the \$5,000,000 Irving Trust check was charged against it. As a result, Begole owned all the stock of Manhattan, having used \$5,000,000 of Manhattan's assets to purchase it.

"Manhattan's Board of Directors was allegedly deceived into authorizing this sale by the misrepresentation that the proceeds would be exchanged for a certificate of deposit of equal value."

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"To complete the fraudulent scheme, Irving Trust issued a second \$5,000,000 check to Manhattan, which Sweeny, Manhattan's new president, tendered to Belgian American Trust which issued a \$5,000,000 certificate of deposit in the name of Manhattan. Sweeny endorsed the certificate of deposit over to New England Note, a company alleged to be controlled by Bourne. Bourne endorsed the certificate over to Belgian American Banking² as collateral for a \$5,000,000 loan from Belgian Banking to New England. Its proceeds were paid to Irving Trust to cover the latter's second \$5,000,000 check.

"Though Manhattan's assets had been depleted, its books reflected only the sale of its Government bonds and the purchase of the certificate of deposit and did not show that its assets had been used to pay Begole for his purchase of Manhattan's shares or that the certificate of deposit had been assigned to New England and then pledged to Belgian Banking."

B. Proceedings in the Federal Courts

In June 1969, Herlands, J., dismissed the federal complaint on motions made by three of the defendants (Appendix in the Supreme Court of the United States, pp. 50a-88a). He stated at the outset (50a): "The issue for decision is another illustration of the recurring problem whether plaintiff's claim belongs in the state courts or whether plaintiff has stated a cause of action under the federal security laws . . . and the pertinent rules and regulations of the Securities and Exchange Commission."

²"Belgian Banking at the same time made a loan to New England Note in the amount of \$250,000 which was distributed in part as follows: Belgian Banking \$100,000, Bourne \$50,000, Begole \$50,000, Garvin, Bantel \$25,000."

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He held that there was a lack of jurisdiction by the federal courts over the subject matter, in that Section 17(a) of the Securities Act of 1933 permitted only a defrauded purchaser of securities to recover damages and S.E.C. Rule 10b-5 prohibited fraud or deception by either a purchaser or seller of securities, but that Manhattan was not a defrauded purchaser or seller of securities, its Treasury bonds having been sold for full consideration. He stated (88a): "The complaint in this case presents no more than a complicated scheme of common law fraud," pointing out that plaintiff had instituted such a common law action in New York County Supreme Court in 1965.

The Court of Appeals for the Second Circuit by a divided court affirmed the dismissal of the complaint (97a-110a), the majority agreeing with Judge Herlands that "no federal cause of action was stated" (104a).

The Supreme Court of the United States reversed, Justice Douglas delivering the opinion of the Court (404 U. S. 6, decided December 8, 1971). He stated:

"Manhattan was the seller of Treasury bonds and, it seems to us, clearly protected by §10(b), 15 U.S.C. §78(j)(b) of the Securities Exchange Act which makes it unlawful to use 'in connection with the purchase or sale' of any security 'any manipulative or deceptive device or contrivance' in contravention of the rules and regulations of the Securities and Exchange Commission.

"There certainly was an 'act' or 'practice' within the meaning of Rule 10B-5 which operated as 'a fraud or deceit' on Manhattan, the seller of the Government bonds. To be sure, the full market price was paid for those bonds; but the seller was duped into believing that it, the seller, would receive the proceeds.

. . .

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"Manhattan was injured as an investor through a deceptive device which deprived it of any compensation for the sale of its valuable block of securities.

• • •

"The crux of the present case is that Manhattan suffered an injury as a result of deceptive practices touching its sale of securities as an investor."

Justice Douglas pointed out that the Court was making no ruling on the point urged by Bankers Life that "the complaint did not allege, and discovery failed to disclose, any connection between it and the fraud and that, therefore, the dismissal of the complaint as to it was correct and should be affirmed."

The opinion concluded:

"The case must be remanded for trial. We intimate no opinion on the merits as we have dealt only with allegations and with the question of law whether a cause of action as respects the sale by Manhattan of its Treasury bonds has been charged under §10(b)."

C. The Merits of the Cause of Action

The evidence necessarily comes from the defendants through their depositions and records; that is the reason for the accumulation of more than 12,000 pages of testimony and approximately 1,700 exhibits by Judge Bauman and Mr. Marchese in their effort to exhaust every possible source of information.

Bankers Life became the sole stockholder of Manhattan in 1957, when it purchased all the outstanding shares. During the following years Manhattan had operating losses and John D. MacArthur, who controlled Bankers Life, was looking for a buyer of its Manhattan stock

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for about a year prior to January 24, 1962, when the sale to Begole took place.

MacArthur sent James Bourland, a Vice-President of Bankers Life, in October 1961 as his personal representative to take charge of Manhattan and endeavor to sell Manhattan. Sweeny, the President of Manhattan, learned of MacArthur's desire to sell Manhattan rather than to continue operating it and told Bourland that he believed he could obtain an offer of \$5,000,000. Sweeny did have negotiations with prospective purchasers, which were unsuccessful. One of these, with Sam Friedlander representing Royal State Bank, provided for a written option to purchase Manhattan for \$5,000,000 to expire November 14, 1961, Bourland receiving a power of attorney from Bankers Life running to February 1, 1962 to execute all papers to effectuate a sale of Manhattan. Although proposed drafts of the contract were drawn up, the sale was not consummated.

On December 8, 1961, Sweeny was asked to resign as President of Manhattan but continued his efforts to sell Manhattan. In late November or early December, 1961, he met Begole, who told him that he represented a Boston group which was interested in acquiring Manhattan. Sweeny met Begole on several occasions thereafter. Begole promised to return Sweeny to the presidency of Manhattan if the purchase by his group went through.

Begole arranged for Sweeny to meet Bourne and his attorney, Samuel Adams, at the Carlyle Hotel on January 16 and 17, 1962. On January 17, 1962 Bourne and Adams had gone to the Chemical Bank New York Trust Company, Manhattan's custodial bank, where, pursuant to Bourland's authorization, they had received a list of Manhattan's securities, which included U.S. Treasury bonds with a total face value of \$5,155,000. Bourne told Sweeny that he was apprehensive of a 5% government

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issue being approved by Congress, in which case Manhattan's bond holdings would drop in value, and asked Sweeny if Manhattan was permitted to invest in certificates of deposit. Sweeny testified that he asked Andrew Pony of the Insurance Department and was told that the Insurance Department had no objection provided the income was at least equal to what Manhattan was getting on the government bonds.

The contract of sale by Bankers Life to Begole was executed on January 14, 1962, with closing set for January 24, 1962. It was to be a cash sale for \$5,000,000, excluding Manhattan's accident and health business, which Bankers Life retained, a profitable part of Manhattan's business. The contract did not contain any of the usual warranties, from which a possible inference would have been attempted to be drawn, in addition to Bankers Life's failure to investigate the financial background of the purchaser, that Bankers Life should somehow have suspected the intentions of the purchaser.

Bourne had been in touch with Garvin, a New York note broker, with whom he had dealings in the past, and arranged with Garvin to request Irving Trust to advance its check for the \$5,000,000 to be used on the closing.

Irving Trust, of course, was not informed as to the exact nature of the transaction. C. Joseph Gunter, in charge of the Security Clearance Department, an Assistant Secretary of Irving Trust, testified that he had known Garvin for about 15-20 years, and had been called by Garvin in early January 1962, inquiring whether Irving Trust would be interested in obtaining an account with a cash balance in the middle six figures and a custody account of about nine million dollars. When Gunter said, "Yes," Garvin said he would be in touch later. No names had been mentioned. He next heard on January 23, 1962 from Garvin, who asked him to meet him and the

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people interested on January 24, 1962 with a five million Irving Trust check, the name of the payee to be given to Gunter on January 24th; Garvin told him that securities would be delivered to him to be sold and the proceeds used to cover the check. Gunter did not discuss this with anyone at Irving Trust.

On the morning of January 24, 1962, at about 10 A.M., Garvin called Gunter to meet him at his office with the Irving Trust check, now telling him to make it payable to Bankers Life and that government securities would be delivered from Chemical Bank to be sold and the proceeds used to cover the check. Gunter had never heard of Bankers Life before. At Garvin's office, he was introduced to Bourne, Begole and Sweeny.

Begole, Sweeny and Gunter went to Manhattan's office before 11 A.M., where a large number of persons were assembled. Gunter testified that at no time was he advised or hear anyone say that the purpose of the meeting was the closing of the sale of Manhattan's shares. He testified that he sat apart from the group of persons, did not hear what was said, did not know what business was being transacted, and simply handed up the \$5,000,000 Irving Trust check when requested by Sweeny at the head of the table. The government securities had not as yet been received by Irving Trust. Gunter testified that it appeared to him, although he made no inquiries, that there was going to be a transfer of securities between two related corporations, but didn't know which was the parent corporation—Manhattan or Bankers Life. Gunter left shortly thereafter.

There is testimony from others at that closing that announcements were made indicating that the transaction was a sale of Manhattan's outstanding stock owned by Bankers Life.

Immediately after the closing a stockholders' meeting was held. Manhattan's directors submitted their resig-

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nations and a new group of directors, including several of the old group, was elected, with Begole as Chairman of the Board and Sweeny as President. Then a special meeting of the new Board of Directors was held at 12:30 P.M. and Adams, one of the new directors, proposed a resolution which was adopted (Appendix, pp. 122a-123a), reading as follows:

"Resolved, that the President be and he hereby is authorized to sell the entire portfolio of United States Government Bonds and Notes held in custody by the Chemical Bank New York Trust Company, at 100 Broadway, New York, N. Y.: and be it

"Further Resolved, that the President be and he hereby is authorized to purchase a Certificate of Deposit from the Belgian-American Bank and Trust Company, not exceeding a face value of Five Million (\$5,000,000) Dollars, for a term of six months, with interest at 3% per annum, which Certificate of Deposit is to be held in trust for the account of the Company upon receipt of a letter from the Belgian-American Bank and Trust Company certifying to the above."

The Resolution would give the impression, along the lines of Bourne's statement to Sweeny, that Manhattan's portfolio of U.S. Bonds, as a potentially losing investment in view of anticipated increase of rate to be paid on new issues, would merely be replaced by a bank certificate of deposit.

Garvin had, prior to the closing, also been in touch with Paul Sandrisser, senior Vice-President of BA Banking and BA Trust, who testified that he had known Garvin for about 25 years, that Garvin offered him a deal whereby BA Banking would issue a certificate of deposit for a deposit of five million dollars and make a

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loan against the certificate of deposit, no names being then mentioned. Sandrisser had the matter approved by a credit committee. He called Garvin back to say he was interested. He later heard from Garvin on January 21 or 22, 1962 that an old insurance company doing business in New York would be making the deposit and that the loan would be to another company, also unnamed. Sandrisser testified that he did not try to ascertain whether it was legal for an insurance company to use its assets as security for a loan to a third party, although he knew that it was the duty of a bank officer to try to ascertain whether loans made by the bank were legal.

Louis Van Damme, President and Chairman of the Board of BA Banking and BA Trust, testified that Sandrisser had brought to his attention a matter of a loan of five million dollars against a certificate of deposit; that on January 22 or 23, 1962, there had been a bank committee meeting, which approved a transaction whereby an insurance company would deposit five million dollars with BA Trust, which would issue its certificate of deposit for that amount, and that a second company would borrow five million dollars from BA Banking, the \$5,000,000 certificate of deposit being endorsed by the insurance company and given to BA Banking as collateral for the loan to that other company. He testified that Sandrisser stated that the insurance company involved was Manhattan but did not name the other company, simply describing it as a finance company from New England. He testified that the reason given by Garvin for giving this business to BA Banking and BA Trust was that, because they were, in effect, one bank, the spread between interest on the loan and interest on the certificate of deposit, required by Federal Reserve regulations to be at least two percentage points, could here be only one per cent.

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Sandrisser was advised by Garvin that this transaction of certificate of deposit and loan was set for the afternoon of January 24, 1962.

Immediately after the closing of Manhattan's Board of Director's special meeting, Adams dictated several letters to Sweeny's secretary for Sweeny's signature as President of Manhattan: to Chemical Bank, to deliver the U. S. Treasury bonds to Garvin; to Garvin, directing him to sell the bonds through Irving Trust for Manhattan's account, and directing the credit to the attention of Gunter at Irving Trust; to Gunter, to receive the securities and credit the proceeds of sale to Manhattan's then non-existent account at Irving Trust; a second letter to Gunter, directing him to pay the \$5,000,000 to be credited to Manhattan's account to BA Trust to effect payment on a certificate of deposit to be issued in that amount; and a letter to BA Trust, directing it to receive \$5,000,000 from Irving Trust and to use it to issue a certificate of deposit in that amount.

Since the \$5,155,000 face value of the bonds would sell for less than \$5,000,000, Sweeny sent Irving Trust an additional \$150,000 by a Manhattan check.

Gunter testified that the U. S. Treasury bonds were not received until the afternoon of January 24, 1962. He had received an envelope when he left Manhattan's office, the contents of which, he testified, he had never examined. Other testimony shows that it contained the stock of Manhattan transferred to Begole, which Gunter was to hold until the bonds were sold and the Irving Trust check to Bankers Life paid for.

The bonds were sold to Irving Trust's subsidiary securities company at the market price of \$4,854,552.67, the amount being credited, together with the \$150,000 Manhattan check, to Irving Trust's internal Checks Clearing Account, which had originally been debited for the \$5,000,000 check payable to Bankers Life. The effect

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of these entries was to use Manhattan's bonds and check to pay for the Irving Trust check payable to Bankers Life. Thus, the conspirators consummated their plan to buy Manhattan with its own assets.

Gunter testified that after the bonds were received, he received a call from Garvin that there was a second half to the transaction, to be held at BA Trust, that it would consist of a "check swap", whereby he was to bring a second check for \$5,000,000 payable to the order of BA Trust, and he would receive in return a \$5,000,000 check of BA Banking. He was told to bring along the envelope he had received that morning, to be turned over to Begole. (A second half of the transaction was necessary for the conspirators, as Justice Douglas pointed out, "to complete the fraudulent scheme", to conceal the fact that Manhattan's stock had been bought by use of Manhattan's own assets by giving the appearance as intended by the Board of Directors' Resolution, that its U. S. Treasury bonds had been replaced by a certificate of deposit; but, which Manhattan's books and records showed that a certificate of deposit for \$5,000,000 had been issued in its name, they did not show the true fact, that the certificate of deposit had been endorsed over and delivered to BA Banking as collateral for a loan in that amount to New England Note Corporation, a corporation without assets, Bourne's corporation, which turned over to Irving Trust the BA Trust check representing that loan, thus effecting the "check swap" arranged by Garvin.)

At BA Trust's office Gunter handed this second \$5,000,000 check to Sweeny, who gave it to Sandrisser. A certificate of deposit for \$5,000,000 was then issued by BA Trust in the name of Manhattan. Sweeny as President and Katz as Treasurer of Manhattan endorsed the certificate of deposit over to New England Note Corporation; and Bourne, on behalf of New England Note

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Corporation, then endorsed it over to BA Banking, signing notes at the same time for a loan in that amount made by BA Banking to New England Note Corporation, Manhattan's certificate of deposit thus being collateral for that loan. BA Banking issued two checks, one for \$5,000,000 representing the loan to New England Note Corporation which was handed to Gunter, and the other for \$250,000 also payable to New England Note Corporation but handed to Bourne, who deposited it in an account in BA Trust. This \$250,000 was a loan to New England, collateralized by Begole's Manhattan stock, to allow New England to prepay interest of \$100,000 on the \$5,000,000 loan made by BA Banking to New England, the remainder being distributed as follows: \$50,000 to Bourne, \$50,000 to Begole, and \$25,000 to Garvin, Bantel. Thus, the conspirators obtained an immediate windfall. In addition, Begole received subsequent dividends on his Manhattan stock, which were used to make the subsequent interest payments due on BA Banking's loan of \$5,000,000 to New England.

When Gunter returned to Irving Trust later that afternoon, he testified that he noticed for the first time that the BA Banking \$5,000,000 check which he had received as a "check swap" was payable to "Irving Trust Co. for the account of New England Acceptance Co., Inc." He called Sandrisser, who told him to put it through with only Irving Trust's Cleaning House number on the back, which he did. Gunter later called Garvin, to request various letters and documents, particularly backdated authorizations by Bourne for New England with regard to the last-mentioned check.

On January 25, 1962 this matter of the two \$5,000,000 checks issued on January 24, 1962 by Gunter came to the attention of various officers of Irving Trust, who investigated and made certain changes in their records to indicate that Manhattan's account was credited with the

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check Irving Trust received from BA Banking and debited for the check to BA Trust, the entries being marked, "1/25/62 as of 1/24/62"; and the debit for the Irving Trust check payable to Bankers Life and the credit for the check from BA Banking were taken off Manhattan's account. Irving Trust's concern regarding the question of the propriety of Gunter's handling of the transaction is shown by Master Index Exhibit No. 183, a lengthy detailed memorandum, dated January 30, 1962, reviewing the results of investigation and noting how the records should read, and by Exhibit No. 184, reviewing the "Handling of Two \$5,000,000 Transactions", as investigated by the Irving Trust staff from 1/25/62 to 1/31/62.

On July 24, 1962 the certificate of deposit issued by BA Trust on January 24, 1962 matured and the BA Banking loan to New England became due. The loan was renewed for another six months, to January 24, 1963. Sweeny had requested that he get physical possession of the new certificate of deposit, as proof of the entry in Manhattan's books and statements certified to the Insurance Department of "Cash in banks \$5,000,000", represented by the certificate of deposit. BA Trust thereupon issued two duplicate certificates of deposit covering the same amount of \$5,000,000, each bearing the same number "T-127", each bearing the same issuance date of July 24, 1963 and the same maturity date, July 24, 1963. BA Banking kept one as collateral for the loan to New England and Sweeny kept the other to be used if need be as ostensible proof of the cash in bank item on Manhattan's books.

In March of 1962 Begole had ordered from a Boston Bank another certificate of deposit for \$500,000 in Manhattan's name, properly using Manhattan's funds for that purpose. In August 1962 he delivered that certificate of deposit for safekeeping to BA Banking.

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Sweeny testified that on August 30, 1962 he was requested by Sandrisser to return to him the copy of the \$5,000,000 certificate of deposit, since BA Banking had been criticized by Banking Department examiners with regard to the New England loan. Sweeny did so, but testified that he requested and received letters acknowledging that BA Banking was holding two certificates of deposit, one for \$5,000,000 and the other for \$500,000, in trust for Manhattan, and would credit Manhattan's account with their proceeds at maturity. Sandrisser rejected the authenticity of these letters. Begole had written a letter on Manhattan's stationery to BA Banking, dated July 24, 1962, stating that the \$5,000,000 certificate of deposit was collateral for the loan to New England, thus contradicting the position claimed to have been taken by Sweeny.

BA Banking refused to renew the loan to New England when it fell due on January 24, 1963. It became necessary for the conspirators to make arrangements to have that loan paid off to BA Banking and at the same time create another certificate of deposit to conceal and cover-up the original fraudulent use of Manhattan's assets to pay for Begole's purchase of its stock from Bankers Life.

Garvin had Begole write a letter on Manhattan's stationery to Irving Trust, requesting the issuance of \$5,500,000 total amount of certificates of deposit and their delivery to Garvin, Bantel. Irving Trust issued these certificates of deposit on January 22, 1963. Garvin had previously arranged with Marine Midland Bank for a loan to Garvin, Bantel in the said amount of \$5,500,000, Irving Trust's new certificates of deposit to be held as collateral for that loan. Marine Midland then paid the \$5,500,000 to Irving Trust and Irving Trust forwarded the certificates of deposit to Marine Midland.

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At the same time Garvin had Irving Trust issue its check for \$5,250,000 payable to BA Banking to pay off the two loans to New England, for which Garvin, Bantel's account was debited by Irving Trust. Irving Trust received in exchange from BA Banking its check for \$5,500,000, representing the proceeds of the two Manhattan certificates of deposit held by BA Banking. Irving Trust credited this check to Garvin, Bantel to pay for the \$5,250,000 check Irving Trust had issued to BA Banking. This left a balance in Garvin, Bantel's account for the difference of \$250,000, for which a special suspense account was opened on February 7, 1963 at BA Banking, and Garvin, Bantel's check for \$250,000 was deposited in it, earmarked as relating to Manhattan. On June 4, 1963, after the liquidation order, a check for this amount of \$250,000 payable to the order of Garvin, Bantel was received by the Insurance Department (Master Index Exhibit 701A).

Begole received his stock back from BA Banking, the \$250,000 loan to New England, for which it had been held as collateral, having been paid off.

After January 24, 1963, the conspirators endeavored to sell Manhattan, but none of several possible deals could be consummated.

In April 1963 Sweeny received a summons and complaint in connection with a promissory note claim, which Manhattan was alleged to have reinsured. Sweeny knew nothing about any such reinsurance treaty and asked Begole about it. Begole said that his signature on behalf of Manhattan on the reinsurance treaty with a Philadelphia insurance company was a forgery. The fact was that Begole was to receive 1/2% of all funds raised by the reinsurance agreement.

This evidently was the last straw for Sweeny, who had suspected shortly after the events of January 24, 1962 that something was wrong, but went along, albeit

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claiming to have protested at various points, with each of the steps of the ongoing manipulations. He demanded Begole's resignation, which Begole tendered on May 9, 1963 and, on that same day, Sweeny told Deputy Superintendent Campbell of the reinsurance treaty and requested an investigation of the certificate of deposit.

The Insurance Department conducted an investigation of Manhattan. Master Index Exhibit 674 is the Department's form of request to Irving Trust, dated May 15, 1963, stating that the department "is now engaged in making an examination of" Manhattan and that, among its assets, according to its books, was "a deposit in your institution", and requesting that "this certificate" be filled out. Irving Trust certified that on May 14, 1963 Manhattan's account was in the amount of \$310,435.83 and that Irving Trust "had on time deposit in this institution the following" certificates of deposit, listing the \$5,500,000 certificates of deposit (being held by Marine Midland as collateral for the \$5,500,000 loan to Garvin, Bantel), further certifying that these certificates of deposit were "free of all liens, claims, or incumbrances, and were not held as security for any loan". The Insurance Department then proceeded to make further inquiries as to the physical location of the certificates of deposit (Master Index Exhibits 676, 677, 680, 680A), which resulted in the admission that Marine Midland had possession of them and were entitled to hold them as collateral for its loan to Garvin, Bantel.

Since this meant that Manhattan was insolvent, an order to show cause was immediately obtained on May 16, 1963 for an order directing the Superintendent forthwith to take possession of the property of Manhattan and liquidate its business and affairs and to dissolve Manhattan's corporate charter. The petition of the Superintendent stated that Manhattan's books

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of account reflected as an asset the sum of \$5,500,000 on deposit in Irving Trust, evidenced by certificates of deposit, but that said certificates were in the possession and control of Marine Midland, which asserted a claim thereto completely inconsistent with any interest of Manhattan; that said sum exceeded Manhattan's surplus to policyholders as reported to the Superintendent as of December 31, 1962 pursuant to Section 26 of the Insurance Law and its loss would render Manhattan insolvent within the meaning of Section 93 of the Insurance Law. The order of liquidation, dated May 24, 1963, adjudged Manhattan to be insolvent; appointed the Superintendent as Liquidator of Manhattan; and directed notice to be given to all policyholders, creditors and all other persons having any unsatisfied claim or demand of any character to file their claims within six months and no later than November 22, 1963.

It may further be noted, as requested by Mr. Annenberg, that the Insurance Department elicited testimony in connection with its investigation of Manhattan, the memorandum, dated June 10, 1963, summarizing such testimony, being Master Index Exhibit 705. That summary of this preliminary investigation was borne out by the subsequent exhaustive depositions conducted by Judge Bauman and Mr. Marcheso, which succeeded in eliciting evidence that could be offered on the trial.

My conclusion, after studying the mass of depositions and exhibits, and analyzing the evidence and the issues, is that the case against the conspirators is quite strong and, indeed, irrefutable, but that this is not meaningful in the context of the proposed settlement, since they are, for all practical purposes, judgment-proof; that, for our purposes, the question narrows down to holding Irving Trust and BA Banking and BA Trust; that there is no evidence pointing to knowledge or knowing participation on the part of any officer or em-

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ployee of those banks in the fraud; that the claim against them depends on inferences to be drawn from their acts, which facilitated the consummation of the fraudulent plan, and are alleged to be contrary to sound banking practice; and that, as proof of such improper practices, they sought to cover-up, after the event, the actual nature of the transaction.

However, regardless of one's assessment of the chances of recovering a judgment against the financially responsible defendants in this case, the real issue here is the amount of damages which Manhattan sustained and could recover on the trial of this action. Since Bankers Life, its sole stockholder, received the \$5,000,000 for its stock, which enabled Begole, one of the conspirators, to become the sole stockholder without the expenditure of a penny, there could not be any claim for damages sustained by any stockholding interest of Manhattan. The only damages which could be recovered is that sustained by claimants—creditors whose proper claims are to be paid in full, making them whole, in addition to paying for the expenses of the liquidation and of this underlying litigation.

Since, as will be fully set forth in (2), *infra*, the \$1,000,000 proposed settlement will substantially accomplish that result, it is within the range of the amount of damages recoverable on the trial and, in view of the factors of time and expense of trial and appeals, and uncertainty of result, it is recommended as a reasonable and fair settlement.

The Damages Recoverable In The Underlying Lawsuit Are In The Range Of One Million (\$1,000,000) Dollars, The Amount Of The Proposed Settlement, That Being The Amount Needed To Assure Payment In Full Of All Proper Claims.

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A. Proceedings In The Liquidation—First Through Seventh Reports

Manhattan was incorporated under the laws of the State of New York in 1949 and was authorized to transact the following kinds of insurance business. Accident and health, fire, fidelity and surety, motor vehicle and aircraft, miscellaneous property, burglary and theft, glass, elevator, personal injury liability, property damage liability, and workmen's compensation and employers' liability. It was authorized to transact business in 13 states. It maintained its principal office at 116 John Street, in Manhattan, New York City.

To protect policyholders the order of liquidation dated May 24, 1963 authorized and directed the Superintendent to reinsure all policy obligations, using unearned premium reserves of such policies to effect such reinsurance pursuant to Section 514 (2-a) of the Insurance Law, and, accordingly, an agreement was made with Empire Mutual Insurance Company, whereby Empire reinsured and assumed all policy obligations accruing after May 24, 1963 in consideration of the payment of 75% of the unearned premiums received by Manhattan on such policies, so that Empire was paid \$5,801,941.50 (1967 Report, Vol. 1, p. 75).

The Liquidator has filed and has had confirmed by orders of the court Seven Reports: First Report dated June 17, 1964; Second Report dated February 3, 1965; Third Report dated August 20, 1965; Fourth Report dated March 15, 1966; Fifth Report dated August 26, 1966; Sixth Report dated March 13, 1967; Seventh Report dated November 8, 1967.

Approximately 20,450 claims were timely filed (that is, prior to November 22, 1963), claiming a total of about \$301,200,000 (many of the claims being filed for amounts covering the policy limits, and some were contingent claims), 6,441 of these being for unstated amounts.

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In addition, approximately 1,350 claims in the approximate amount of \$11,000,000 were filed late, 663 of these being for unstated amounts. Section 543 (3) of the Insurance Law provides that all late (or deferred) claims (that is, those filed with the Liquidator subsequent to November 22, 1963) shall not share in the distribution of the assets of the company until all allowed timely claims have been paid in full with interest.

Workmen's Compensation claims are preferred claims by virtue of Section 34 of the Workmen's Compensation Law, providing that "Compensation shall be a lien against the assets of the carrier or employer . . ." Accordingly, through the Seventh Report, from 5/24/63 through 7/31/67, the Liquidator paid Workmen's Compensation claims totalling \$505,635.84 (Vol. III, p. 1661). In addition, Section 109-c of the Workmen's Compensation Law provides for payment from the Stock Workmen's Compensation Security Fund of valid claims of doctors for treatments to injured employees, for hospital services and drugs, the Liquidator having paid through the Seventh Report, from 5/24/63 through 7/31/67, a total of \$110,191.65 (Vol. III, p. 1661).

Order dated July 7, 1964 confirming the First Report appointed two referees to hear and take evidence on the objections filed to the Liquidator's First Report and to the succeeding Reports and to report thereon. Each of the Reports contained recommendations with respect to the allowance or disallowance of claims.

The major portion of the claims filed were covered by Sections 330 and 333 of the Insurance Law.

Section 330 provides for the creation of two funds, one of which, the "Stock Public Motor Vehicle Liability Security Fund", applies to stock insurance companies, thus including Manhattan. It secures the bene-

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fits provided by Section 17 of the Vehicle and Traffic Law in those cases where a corporate surety bond or policy of insurance of a responsible stock insurer is accepted by the Commissioner of Motor Vehicles as compliance with Section 17.

Section 333 of the Insurance Law provides for the creation of a fund for both stock and mutual insurers, the "Motor Vehicle Liability Security Fund". It secures the benefits provided under policies on account of claims from motor vehicle accidents.

Each of these funds is maintained by payments, based on the amount of premiums, by the companies coming within their provisions. The Superintendent of Insurance is the administrator of both funds and the Commissioner of Taxation and Finance their custodian. The sections provide that payments from the funds shall be made by the Commissioner upon certificates filed by the Superintendent acting as Liquidator, Rehabilitator, or Conservator, pursuant to Article XVI of the Insurance Law. Expenses incurred by the Superintendent as administrator of the funds include the services of the Superintendent's representative before the court having jurisdiction of any action against former assureds, as well as the services of investigators, clerical help, etc., and are chargeable against the funds as administrative expenses.

In accordance with the provisions of Sections 330 and 333 the Superintendent has certified allowed claims, as determined by the court or permanent court order, to the Commissioner for payment in such amounts from the said two funds, payment thereupon being made by the Commissioner to the Superintendent and in turn by the Liquidator to each claimant. The Commissioner then has a valid general claim in this liquidation proceeding for the repayment of such amounts less the contributions previously paid into the funds by Manhattan.

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The summary of Sections 330 and 333 dispositions from the First through the Seventh Reports, i. e., as of July 31, 1967, shows the following (Seventh Report, Vol. II, p. 714):

Number of Claims	Amount Claimed	Amount Disallowed	Allowed
Section 330			
27	\$696,312.25	\$659,473.00	\$36,837.25
Section 333			
3,475	\$49,649,611.41	\$46,135,056.69	\$3,514,554.72

The order, dated December 28, 1967, confirming the Seventh Report, authorized the Liquidator to settle and compromise "suspended" claims timely claims not theretofore recommended for either allowance or disallowance, said claims thereupon to be deemed allowed in the amount of the settlement, without further order of the court; while suspended claims not so settled could be disposed of by recommending their disallowance or partial allowance upon written notice to such claimants so that objections by claimants would be included in the reference to the two named referees, and upon failure of claimants to file objections within the required time, the said claims were deemed disallowed and barred from participation in the assets of Manhattan, without further order of the court. The order also provided that the Liquidator was to take no proceedings with respect to "late" claims filed after November 22, 1963, unless there existed a surplus after payment in full, with interest, of all duly allowed claims timely filed. The Liquidator was further authorized and directed,

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after reserving funds for the payment of future expenses of liquidation, taxes and contingencies, to distribute the remaining funds in the proceeding, as such funds became available for distribution, by payment of one or more pro-rata dividends on all allowed claims (except those allowed claims paid pursuant to Sections 330 and 333, which are treated separately, since payable in full from the moneys received by the Superintendent from the Commissioner out of those security funds).

With respect to general claims, policyholder and non-policyholder, the Seventh Report listed the totals of the First through the Seventh Reports (p. 714) as 1304 policyholder claims, amount claimed \$11,237,860.57, amount disallowed \$10,520,389.67, amount allowed \$737,470.90; 722 non-policyholder claims, amount claimed \$155,022.32, amount disallowed \$11,906.73, amount allowed \$143,115.59. A first and second dividend totalling 20% was paid between the First and Seventh Reports on these allowed general claims.

With regard to the assets of Manhattan, the "Statement Of Assets, Liabilities and Reserves As At July 31, 1967 and May 24, 1963 Based On Book Value" shows the inclusion in each of "Certificate of Deposit Receivable \$5,500,000", which is the subject of the underlying lawsuit, so that the actual assets otherwise available are \$5,500,000 less than the totals shown. It well also be noted that there is a difference of about 5 million dollars between the 18 million total shown for 1963 and the 13 million total for 1967, that difference representing the approximate 5 million paid to Empire Mutual to take over the reinsurance of all of Manhattan's policies for which premiums had been received by Manhattan.

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The Seventh Report lists in 11 detailed Schedules (Vol. I, pp. 49-72) the assets shown on the Statement "As At July 31, 1967": *Cash In Banks* (principally interest-bearing certificates of deposit) \$3,891,025.72 (so that interest has been accruing and has been increasing asset value from July 31, 1967 on and all during the time this proposed settlement proceeding has been and will be pending); *Bonds* of \$2,941,331.21 (consisting principally of U. S. Treasury bonds, Public Authority bonds, and Public Utilities bonds, which also pay interest); *Stocks* of \$92,981.25 (principally preferred stocks of public utilities); and *miscellaneous* assets.

The Seventh Report also lists in a detailed Schedule (Vol. I, Exhibit A-3, pp. 73-78) a "Statement of Income, Disbursements And Adjustments For The Period Extending From May 24, 1963 to July 31, 1967," which shows the following:

<i>Statement of assets as at May 24, 1963</i>	\$18,147,347.30
<i>Adjustments—miscellaneous</i>	146,950.48
	<hr/>
Total	\$18,294,297.78
<i>Add: Unlisted assets set up by</i>	
Liquidator	2,082,031.41
Income Received to July 31, 1967	5,083,469.92
Other Miscellaneous Receipts	270,355.56
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Total assets as of July 31, 1967 to be accounted for	\$25,730,154.67
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*Report of Referee, Dated June 4, 1973**Disbursements and Adjustments*

Liquidator's Expenses (principal item, Salaries \$1,434,994.68)	\$ 2,225,673.35
Other Disbursements (principal item, pay- ment of unearned premiums on rein- surance assumed by Empire Mutual— \$5,801,941.50; includes Expenses—re Suit to Recover \$5,500,000 Certificates of Deposit—\$157,513.85)	6,907,287.00
Claims Paid (Sections 330 and 333 claims paid from monies received from the Sections 330 and 333 security funds, not included herein, since not an actual disbursement chargeable against Man- hattan's assets until assets are avail- able for repayment to Commissioner)	1,065,778.09
Assets Written Off (principal item, Un- earned premiums on policies cancelled —\$1,082,522.55)	1,693,856.93
Ancillary Receivers, less interest received on applicable bonds	30,140.27
Total Disbursements and Adjustments	<u>\$11,922,735.64</u>
Total Assets to be Accounted For As At July 31, 1967	<u>\$13,807,419.03</u>

(However, it will be noted that, included in the \$13,807,419.03, is the \$5,500,000 face amount of the Certificates of deposit, which is the subject of the underlying lawsuit.)

*Report of Referee, Dated June 4, 1973***B. The One Million (\$1,000,000) Dollars Settlement
Should Permit Payment in Full of All Proper Claims**

In the period between July 31, 1967 and December 31, 1972, pursuant to the authorization of the order, dated December 28, 1967, the Liquidator paid an additional 30% dividend on general claims, settled and paid additional allowed claims, and disbursed additional moneys for expenses.

Accordingly, the approximate \$8,300,000 of assets as at July 31, 1967 (\$13,807,419.03 less the \$5,500,000 certificates of deposit in suit) was reduced to approximately \$6,686,000 as at December 31, 1972.

This consisted of:

Cash In Banks	\$3,985,000
Securities (Market Value Dec. 31, 1972)	2,620,000
Reinsurance Recoverable	6,000
Cash In Revolving Fund	75,000
	<hr/>
Total Assets	\$6,686,000
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Proof of the statement made in the Superintendent's petition for approval of the One Million (\$1,000,000) Dollars settlement, that it will permit payment in full of the allowed claims, is furnished by the "Statement of Additional Funds Required To Pay All Claims As At December 31, 1972" (see deemed Exhibits). This was prepared under the supervision of Herbert Cohen, controller of the Liquidation Bureau (169-170).

This Statement first lists the Assets totalling \$6,686,000.

With regard to Liabilities, this Statement sets forth: (1) the amounts still to be paid with respect to claims, which have been processed; (2) the amount of the reserves estimated by the controller of the Liquidation Bureau by projection on the basis of past payment of

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claims and spot checking files (182), as needed to cover unadjudicated, suspended and late claims and certain Workmen's Compensation claims for which reserves were required to be set up; (3) the estimated future expenses from December 31, 1972 to date of final accounting.

(1) The amount still to be paid with respect to claims, which have been processed, is \$5,020,666.85, consisting of the following:

(a) Additional policyholder claims had been allowed since July 31, 1972 of \$1,159,159.27, and non-policyholder allowed claims had increased to \$306,566.49; the Liquidator paid an additional dividend of 30% during this period, making total dividends of 50% or \$732,547 paid on such allowed claims, so that the additional amount needed to pay these allowed claims in full (there is a slight discrepancy in the figures, perhaps involving a last-minute settlement of a claim not yet receiving the dividends) is \$733,178.

(b) Additional Sections 330 and 333 claims were paid since July 31, 1937 with moneys received from the Commissioner as custodian of those security funds, so that the following totals existed as of December 31, 1972:

	Section 330	Section 333	Repayable to Consumer
Paid Allowed Claims	\$46,801.65	\$4,303,629.39	
Less Contributions Paid by Manhattan	97,381.80	411,294.53	
Repayable	none	\$3,892,334.86	\$3,892,334.86

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(c) Computed Workmen's Compensation payments due consist of the following:

1. New York State claim under Section 109-C, W.C.L., for amounts paid out of the Stock Workmen's Compensation Security Fund, amounting to \$110,191.86 as at December 31, 1972, repayable to the Commissioner of Taxation and Finance as custodian of said Fund pursuant to subdivision 5 of Section 109-C; and medical and hospital claims for \$71,578.32 due under Misc. 27-Sec. 15(8h), providing for payments to Special Disability Funds, for total of \$211,612.18.
2. Preferred claims, consisting of claims under:

Misc. 27 Sec. 25a	\$ 41,864.93
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(Depositing into aggregate trust fund of present value of award providing for periodic payments, in cases of death or permanent disability)

Sec. 151	\$125,063.31
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(Proportionate assessment upon carriers of administration expenses for cost of operation of Workmen's Compensation Board)

Sec. 214 and 228	\$ 6,820.92
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(Proportionate assessment upon carriers for Special Fund for Disability Benefits)

Chapter 320	\$ 9,792.65
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(Provision for special fund for Workmen's Compensation for civil defense volunteers)

	\$183,541.81
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The sum total of (1) is \$5,020,666.85.

(2) The amount of the reserves estimated as needed to cover unadjudicated suspended and late claims and certain Workmen's Compensation claims for which reserves were required to be set up, is \$1,708,626.60, consisting of the following:

Workmen's Compensation claims Reserves	\$ 223,059.61
Reserve for Suspended Claims (including Sections 330 and 333 claims)	528,207.13
Reserve on Claims in Suit not Reserved	300,000.00
Reserve for Unpaid Claims under Section 109-C	23,319.86
Reserve for Disallowed Claims Before Referees	234,040.00
Reserve for late or deferred claims	400,000.00
	<hr/>
	\$1,708,626.60

(Mr. Minches testified (183) as to the several reserve figures in the "Statement of Additional Funds": "I will have to add them up. I think if you go to the second page you could break it down. I believe the figures there reach about a million and a half." Actually, the estimated reserves, including the reserve of \$400,000 for deferred claims on the first page, total \$1,708,626.60.)

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(3) The estimated future expenses from December 31, 1972 to date of final accounting is \$725,000, consisting of the following:

Estimated Future Expenses (Not Recoverable from Security Funds)	\$275,000
Estimated Future Expenses, including Cost of Filing Final Accounting (Recoverable from Security Funds)	450,000
	<hr/>
	\$725,000

Mr. Minches testified (177-179, 192-195) that both of the above estimates were based on past experience of the amount of expenses for the work done on Manhattan and the estimate as to how long it would take to complete the liquidation; that they covered all future anticipated expenses—the allocation of salaries of employees working on the liquidation of Manhattan, the allocation of all office expenses, such as rent, telephone, office supplies, and the balance of the attorneys' fees in the underlying litigation and legal services in the liquidation proceeding, including cost of filing of final accounting. The only distinction between the two figures (193-194) is that the \$275,000 represents estimated future expenses with regard to cases not covered by the Security Funds, being payable out of the assets of Manhattan, such as general liability cases; while the 450,000 figure represents estimated future expenses covered by the Security Funds, such as automobile cases, and ordinarily advanced by the Security Funds but here, if the \$1,000,000 settlement is consummated, payable from the assets of Manhattan as increased by the \$1,000,000.

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Summarizing the Statement as at December 31, 1972:

Assets	\$6,586,000
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Liabilities

(1) Amount still to be paid with respect to processed claims	\$5,020,666.85
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(2) Estimated reserves to cover unadjudicated suspended and deferred claims and certain Workmen's Compensation claims requiring reserves to set up	1,708,626.60
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(3) Estimated Future Expenses of the Liquidation and of the underlying lawsuit	725,000
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Total	<u>7,454,294</u>
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Deficit (and minimum additional funds required to pay all proper claimants in full.)	\$768,294
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The \$1,000,000 settlement thus would leave a surplus of about \$232,000 to take care of any contingencies and interest due on timely claims (interest is required, pursuant to Section 543(3) of the Insurance Law, to be paid before late claims may be paid). Since pre-verdict interest is not due on personal injury claims, which constitute the bulk of the claims, the interest on timely property damage and property claims up to date of liquidation would not be a significant figure. Moreover, the assets have been and are being increased by the interest paid and payable on the approximate \$6,000,000 cash and bonds owned by Manhattan as at December 31, 1972.

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In February and March 1973, in preparation for the hearings to be held on this reference, the Superintendent had a team of four employees review the files of all outstanding claims and evaluate each particular claim in order to fix, more precisely than the estimated reserves in the December 31, 1972 Statement, the actual reserve for each claim (the method employed by all casualty companies).

Allan E. Peterman, the supervisor of this team, testified (110-153, 196-200). All of these men had extensive experience as manager, supervisor of claims, claims men, in the casualty claim business, one of them having been engaged on Workmen's Compensation claims. Their regular work for Manhattan had been in reviewing, evaluating and working up claims and suits, with their recommendations as to allowance or disallowance being presented to the claims committee of the Liquidation Bureau. The team spent the "better part of six or eight weeks . . . full time, a full day" (131) in making this evaluation of the reserves to be set up on the outstanding claims.

The "Summary of Inventory Of Claims Reviewed, Evaluated and Reserved—February-March, 1973" (see deemed Exhibits) sets forth all the outstanding claims in six categories:

(1) *Suspended* (i.e., timely but unadjudicated) *Personal Injury and Property Damage*—588 outstanding claims; 365 to be disallowed; 223 to be adjudicated (i.e., recommended for allowance in some amount) for which reserves of \$148,088 were fixed;

(2) *Suspended General Liability*—143 outstanding claims; 38 to be disallowed; 105 to be adjudicated, for which reserves of \$191,700 were fixed;

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(3) *Deferred (i.e., late) Personal Injury and Property Damage*—933 outstanding claims; 428 to be disallowed; 505 to be adjudicated, for which reserves of \$144,272.42 were fixed;

(4) *Deferred General Liability*—250 outstanding claims; 108 to be disallowed; 142 to be adjudicated, for which reserves of \$95,828 were fixed;

(5) *Preferred Workmen's Compensation Claims*—17 outstanding claims, all allowed, for which reserves of \$233,059.61 were fixed (this appears to be the same figure as that shown on page 2 of the December 31, 1972 Statement, stated there, apparently by typographical error, as \$223,059.61);

(6) *All Other Claims Suspended and Deferred*—196 outstanding claims, all to be adjudicated, for which reserves of \$131,038.88 were fixed.

The total amount of such actually computed reserves is \$943,986.91, which is \$764,639.69 less than the estimated reserves totaling \$1,708,626.00 contained in the December 31, 1972 Statement. Thus, the surplus, after payment of all proper claims and the expenses of the liquidation and the underlying lawsuit, for contingencies and interest on timely property damage and property claims, after crediting the \$1,000,000 settlement, if approved, would be about \$996,000.

Mr. Peterman testified (117) that the claims "to be disallowed" were those where there was no legal obligation on the part of the Liquidator, since they involved third-party claimants already paid by the Liquidator under another claim number, the claim being disallowed being merely a policyholder's claim requesting policy protection of Manhattan, which should have been extinguished upon payment of third-party claimant; where the attorney after all the years of the liquidation could not locate

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his client; where a stipulation of discontinuance was shown by the file to have been prepared but not filed; where the statute of limitations applied as of the date of the liquidation proceeding.

Mr. Peterman testified that the team evaluated unstated claims on the basis of Manhattan's retention of responsibility in the amount of \$10,000, the balance of the claim, if any, having been reinsured (133, 135, 199-200).

Mr. Peterman testified that the last category, "All Other Claims, Suspended and Deferred," represented all the outstanding miscellaneous types of claims—burglary, fire, health, disability and the like (116).

Mr. Minches testified that the full amount claimed on almost all of these 196 outstanding miscellaneous claims was taken and included in the reserve set up of \$131,038.88; that the claim of Harry Berg, the claimant represented by Mr. Annenberg, for \$80,000, a disability claim, was included in the full amount of \$80,000 in that reserve of \$131,038.88 (166-167).

At my request Mr. Annenberg had stated for the record (108) the facts with reference to the claim of Harry Berg; that it was a claim under a disability policy for the sum of \$79,000; that the Superintendent had disallowed the claim; that the Referee after a hearing recommended allowance in the amount of \$2,500; that the court granted the Superintendent's motion to confirm and denied Mr. Annenberg's cross-motion for modification to the extent of allowing the full amount of the claim; and that Mr. Annenberg had filed notice of appeal but the appeal had not been prosecuted further.

It thus appears that Harry Berg has, with reference to his claim, no basis for objection. It has previously been pointed out that the Estate of Matthew Brandenburg has no basis whatsoever for objection on the facts and law relative to the amount of damages recoverable, and, indeed, has no standing to object.

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However, as stated by me on the hearing (14), I considered the question of the fairness of the proposed settlement "broadly with reference to and in the interests of all proper claimants, not limited by the standing or lack of standing of these objectants."

CONCLUSION

Having carefully considered the evidence presented at the hearings, the volumes of documentary evidence with regard to the underlying cause of action and the liquidation proceeding, and the law applicable to the cause of action and to the various categories of claims, I recommend to this Court that the proposed One Million (\$1,000,000) Dollars settlement be approved by the court as fair and reasonable, as set forth in the petition of the Superintendent of Insurance, as Liquidator, and the relief prayed for therein granted, in light of the fact that the proposed settlement should permit payment in full of all proper claims.

I submit herewith the minutes of the hearings held before me. The deemed exhibits, as previously noted under "Proceedings on Reference," will be delivered by Mr. Marcheso to the clerk of Special Term, Part I, at the time that a motion is made to confirm or reject this Report.

Dated: New York, New York
June 4, 1973

Respectfully submitted,

s/ SAMUEL M. GOLD
Referee